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95-1612

Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden,
Petitioner,

v.

CHARLES EDWARD MOORE, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

CAPITAL CASE

QUESTION PRESENTED

Where a district court grants habeas corpus relief in a capital case, orders the state to release or retry the defendant within 60 days, and refuses to stay the order, does the state moot its appeal by initiating new trial proceedings rather than releasing the defendant from its custody?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES EDWARD MOORE, JR., *Respondent*.

OPINIONS BELOW

A copy of the order of the United States Court of Appeals for the Ninth Circuit dismissing the state's appeal as moot is attached to this petition as Appendix A. A copy of the amended order dismissing both the state's appeal and Moore's cross-appeal as moot is attached as Appendix B. A copy of the order denying rehearing and rejecting rehearing en banc is attached as Appendix C.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was filed on December 28, 1995. Apendix A. The amended order was filed on January 10, 1996. Appendix B. Rehearing was denied and rehearing en banc was rejected on March 5, 1996. Appendix C. This petition for writ of certiorari is filed within 90 days of the date rehearing was denied. 28

U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III, section 2 of the United States Constitution provides, in pertinent part:

> 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . .

Title 28, section 2253 of the United States Code provides, in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

STATEMENT OF THE CASE

Following trial by jury in California in 1984, respondent Charles Edward Moore, Jr. (Moore) was convicted of two counts of first degree murder. The evidence at the penalty phase showed that he also committed a murder in Kansas shortly before the California crimes. Moore was sentenced to death.

The California Supreme Court affirmed the judgment of conviction in 1988, holding, *inter alia,* that Moore's motion to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975), which was made on the date his trial was scheduled to begin, was properly denied as untimely under established California law. *People v. Moore*, 47 Cal.3d 63, 78-81, 762 P.2d 1218, 152 Cal.Rptr. 494 (1988). On March 31, 1995, the district court granted a petition for writ of habeas corpus on

summary judgment of three of the 27 claims, finding, *inter alia,* that Moore's motion to represent himself was timely under Ninth Circuit authority, which employs a different test of timeliness from California, and therefore should have been granted.[1] Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B, and C, at 30-37. The district court found the *Faretta* error reversible per se and ordered petitioner Arthur Calderon, the Warden of the California State Prison at San Quentin (the state), to release Moore within 60 days unless the state granted him a new trial within that time. *Id.* at 54, 64-65.

The state filed a notice of appeal and requested a stay of the order, which was denied by the district court, the Ninth Circuit panel, and the Circuit Justice of this Court. In its 2-1 denial of the stay filed on May 26, 1995, the Ninth Circuit indicated that it would "shortly" issue an "expedited" briefing schedule for the appeal. *Moore v. Calderon*, 56 F.3d 39, 40 (9th Cir. 1995).

Faced with the alternatives of retrying Moore or releasing him from its custody,[2] the state chose to

---

1. The district court also found that Moore was entitled to relief because the trial court erroneously denied his *Faretta* motion to represent himself at the guilt phase closing argument. The district court rejected Moore's claims that he was entitled to substitute counsel, co-counsel status, and a second attorney, and that he had a right to be present at calendar call; those findings are the subject of Moore's cross-appeal.

2. Moore has outstanding non-capital judgments in Kansas and Colorado, but neither of those states has ever lodged a detainer against him in California. Regardless whether Moore might have been released to a sister state, California has a strong interest in retaining custody of Moore under the 1984 judgment of death, as the state has no assurance that Moore would remain incarcerated if it releases him to a state in which he is not subject to the death penalty.

comply with the district court's order by initiating retrial proceedings while the appeal moved forward. The state also informed the Ninth Circuit that Moore had been granted a new trial. Response to Order Re: Appellee's Custody and Trial Status, filed July 20, 1995.

Seven months passed without the Ninth Circuit setting a briefing schedule, despite the state's request that it do so. On December 28, 1995, on its own motion and without any briefing, the Ninth Circuit summarily dismissed the appeal as moot because the state had granted Moore a new trial. Appendix A, B.

The state filed a timely petition for rehearing and suggestion for rehearing en banc on January 11, 1996. The Ninth Circuit denied rehearing and rejected rehearing en banc on March 5, 1996. Appendix C.

REASONS FOR GRANTING THE PETITION

By its order dismissing the appeal as moot, the Ninth Circuit establishes a rule that strips the state of its statutory right to appeal an unstayed order granting habeas relief unless it releases the defendant. Thus, as here, if the state declines to release a dangerous capital defendant convicted of three murders in two jurisdictions, but instead complies in good faith with the habeas order by granting the defendant a new trial, the state forfeits its right to appeal.

The Ninth Circuit's anomalous rule forces the state to choose between two equally untenable options: an appeal at the cost of the defendant's release, or the defendant's continued incarceration and retrial at the cost of appellate review. In addition, the rule violates the principle of comity, as it essentially makes unreviewable a single district judge's unstayed order striking down a judgment that has been affirmed by the state supreme court.

By granting certiorari in this case, this Court will have an opportunity to decide a previously unexplored jurisdictional issue that is of critical national importance, as it will determine what alternatives are available to the states in every case involving an unstayed order granting habeas relief. The state's dilemma is particularly acute in capital cases, where its obligation to protect the public is pitted against its interest in defending those criminal judgments in which the state has the greatest investment of public resources.

ARGUMENT

In this instance, the Ninth Circuit plainly misapplied the law pertaining to mootness by dismissing the appeal. *See* U.S. Constitution, art. III, sec. 2. Generally, a case becomes moot when the issues presented are no longer "live," or when the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States,* 506 U.S. 9, 12 (1992) (citation omitted). In applying this test, the reviewing court is concerned "only with the question whether *any* relief can be ordered," *id.* at 14 n. 6 (emphasis in original), not whether the appellant's claim is likely to be meritorious on appeal. *Id.* at 17. Thus, the availability of any "possible remedy" is sufficient to prevent an appeal from being moot. *Id.* at 13.

In the present case, the Ninth Circuit clearly can grant "effectual relief" to the state by reversing the district court's order granting the habeas petition and reinstating the state court judgment. As discussed below,

such relief is available regardless whether the retrial has occurred. The Ninth Circuit's conclusion that mootness has intervened to defeat its appellate jurisdiction is simply wrong.

At a minimum, the Ninth Circuit's finding of mootness is premature. Moore's motion to represent himself on retrial was granted on June 30, 1995. In the ensuing nine months, Moore has requested repeated continuances. At present, there is no trial date scheduled, let alone a verdict after retrial. "A habeas corpus petition is not moot 'until it can be said with certainty' that the state court judgment in question will not affect the petitioner's liberty." *Adamson v. Lewis*, 955 F.2d 614, 618 (9th Cir. 1992), *cert. denied*, 505 U.S. 1213 (1992) (appeal of district court's order granting writ was not moot where state entered into new plea agreement with defendant which required him to testify against others, but where those trials had not yet taken place). Therefore, under its own jurisprudence, the Ninth Circuit had no basis for assuming that it could not resolve the appeal before the retrial was completed.[3] Under any analysis, the appeal is not yet moot.

Next, even if Moore had already been retried, the state has a viable and ongoing interest in enforcing the 1984 judgment. If Moore is again convicted and sentenced to death, the second judgment will be subject to automatic appeal in state court and collateral attack in both state and federal courts, and will be final and

3. Indeed, based on the movement of contemporaneously docketed cases, if the Ninth Circuit had scheduled expedited briefing as it indicated it would do in May of 1995, the appeal might well have been decided by now. *See, e.g., Franklin v. Duncan*, 70 F.3d 75 (9th Cir. 1995) (district court granted writ on April 8, 1995; Ninth Circuit set expedited briefing schedule, heard oral argument, and filed opinion seven months later, on November 20, 1995).

enforceable only after years of litigation. The 1984 judgment has been litigated and upheld by the California Supreme Court on direct appeal and on state habeas corpus review, and is already 12 years further along the appellate path than a new judgment would be under the most expedited circumstances. The state has a compelling interest in avoiding the "severe prejudice" associated with delay in enforcing its judgments, *see In re Blodgett*, 502 U.S. 236, 239 (1992), not to mention the substantial expenditure of public resources necessary to pursue the second judgment -- a pursuit that would be wholly unecessary if the original judgment is reinstated on appeal. Thus, even if the state prevails on retrial, it nonetheless has a continuing interest in seeking "effectual relief" on appeal through reinstatement of the original judgment.

Further, the state's interest in appealing the original judgment is even more pressing if Moore receives less than a death sentence on retrial, because only an appeal can establish the lawfulness of the original judgment. If the district court's order is reversed on appeal, the parties will be restored to their original status, and retrial under the compulsion of an overturned order will have no effect. "Reversal undoes what the habeas corpus court did and makes lawful a resumption of custody." *Eagles v. Samuels*, 329 U.S. 304, 308 (1946); *cf. Cates v. Superintendent, Indiana Youth Center*, 981 F.2d 949, 952 (7th Cir. 1992) (where state releases prisoner on parole pursuant to unstayed grant of writ, appellate court "maintain[s] jurisdiction because of the state's interest in possibly restoring a defendant to custody").[4] Accordingly, appeal is the only avenue by

4. Nor would the nullification of an improperly ordered retrial suggest any injustice if Moore did obtain a better result in 1996 than in 1984. If the first trial was constitutionally fair, a subsequent

which the state can obtain "effectual relief" if Moore is not sentenced to death on retrial.

Moreover, the state's good faith compliance with a district court's order does not moot an appeal where the state continues to challenge the correctness of that order. *See, e.g., Lynch v. United States Parole Com'n*, 768 F.2d 491 (2d Cir. 1985) (Parole Commission's compliance with district court's order to hold new hearing did not moot appeal, where commission asserted that its original determination was valid and sought to reinstate it); *United States v. Timberland Paving & Const. Co.*, 745 F.2d 595, 598 (9th Cir. 1984) (appellant's payment of damage award pursuant to district court's order did not moot appeal). This is so because the state's compliance with an unstayed order is not the equivalent of conceding the underlying merits of the order or abandoning its challenge to that order. *See Johnson v. Riveland*, 855 F.2d 1477, 1483-84 n. 7 (10th Cir. 1988).

In the present case, the state has never abandoned its challenge to the district court's grant of the writ; the state initiated new trial proceedings solely under compulsion of the district court's unstayed order, without reason to believe that it was thereby forfeiting its right to appeal under 28 U.S.C. § 2253. To the contrary, the state has always maintained its strong interest in the appeal. The current conflict between California and the Ninth Circuit regarding the standard of timeliness for a *Faretta* motion exposes an untold number of state

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more favorable result has no constitutional significance. Indeed, a more favorable verdict on retrial could presumptively be attributed to the prejudice inherent from the delay of retrying a criminal defendant 12 years after the first trial, and 19 years after the crimes were committed. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

convictions to reversal on federal habeas review. As the district court acknowledged in its opinion, only this Court or the Ninth Circuit sitting en banc can fully resolve this issue. Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B, and C, at 32 n. 24.[5]

Finally, our research has uncovered only one case remotely comparable to the Ninth Circuit's singular practice of dismissing the state's appeal from an unstayed

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5. The California Supreme Court has held that a defendant's motion to represent himself is timely, and therefore unconditional, when made "within a reasonable time prior to the commencement of trial." *People v. Windham*, 19 Cal.3d 121, 127-128, 560 P.2d 1187, 137 Cal.Rptr. 8 (1977). An untimely motion is addressed to the trial court's discretion in light of various factors. *Id.* at 128. In contrast, the Ninth Circuit holds that a *Faretta* motion is timely if it is made before the jury has been empaneled, unless it is shown to be made for the purpose of delay. *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986). The California Supreme Court has expressly rejected the Ninth Circuit rule as being "too rigid in circumscribing the discretion of the trial court." *People v. Burton*, 48 Cal.3d 843, 854 & n. 2, 771 P.2d 1270, 258 Cal.Rptr. 185 (1989). However, without ever considering the "new rule" implications, *see Teague v. Lane*, 489 U.S. 288 (1989), the Ninth Circuit has applied its own rule to state cases on habeas corpus. *Savage v. Estelle*, 924 F.2d 1459, 1463 n. 7 (9th Cir. 1990); *Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985); *Fritz v. Spaulding*, 682 F.2d 782, 784 (9th Cir. 1982); *Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir. 1982); *but see Hamilton v. Vasquez*, 17 F.3d 1149, 1158 (9th Cir. 1994) (Ninth Circuit found that self-representation motions made "before trial, including one on the morning of trial," were untimely). Thus, in determining whether a *Faretta* motion is timely, the California trial courts are placed in the position of having to look to the California Supreme Court for precedent, and then to the Ninth Circuit for reversal.

habeas order as moot because of an intervening retrial.[6] In that decision, *Johnson v. Smith*, 764 F.2d 114 (2nd Cir. 1985), the finding of mootness was ultimately correct. However, the appellate court's discussion of the issue is faulty, and the circumstances underlying the finding are distinguishable from those here.

In *Johnson*, a non-capital case, the district court granted a habeas petition and ordered the state of New York to vacate the conviction or retry the defendant. The state appealed and unsuccessfully sought a stay of the district court's order. The defendant cross-appealed on an evidentiary claim which the district court had rejected. Rather than have the conviction vacated, the state retried the defendant and obtained a new conviction. Content with the conviction on retrial, the state moved to dismiss both its appeal *and* the defendant's cross-appeal on the ground of mootness. The defendant resisted the dismissal of his cross-appeal. *Id.* at 115-16.

The only disputed issue relating to mootness in *Johnson* concerned the defendant's cross-appeal, not the state's appeal, which the state elected to abandon in favor of the results of the retrial. The state thereby conceded the underlying merits of the district court's

6. In *Garrison v. Hudson*, 468 U.S. 1301 (1984), Chief Justice Burger granted an in-chambers stay of the defendant's scheduled retrial following reversal on habeas corpus. North Carolina argued that proceeding with the retrial would moot certiorari review. Without analysis or discussion, Chief Justice Burger accepted the state's position and stayed the retrial until this Court acted on North Carolina's pending petition for certiorari. However, California has never advanced such a position or conceded such a point in seeking a stay in this case. Further, at the very least, the order implies that an appeal does not become moot *before* retrial has occurred.

order and terminated its interest in any controversy. *Cf. Johnson v. Riveland*, 855 F.2d at 1483-84 n. 7 ("The State's concession and lack of challenge are distinguishable from those instances where the government . . . challenges the relief ordered by a prior court ruling and reserves its right to revoke such relief if the appellate review reverses the district court").

As to the defendant's cross-appeal on the evidentiary claim, the *Johnson* court correctly determined that it was moot after retrial. The court stumbled, however, when it applied the same reason for mootness to the *state's* appeal, finding, "Once retrial occurred, the appeal became moot, as did the cross-appeal, since they both raised hypothetical issues, the earlier trial no longer being the cause of Johnson's incarceration." 764 F.2d at 116. Plainly, the defendant's evidentiary claim was moot because, in the face of the retrial and conviction, the appellate court could grant the defendant no "effectual relief." However, no such circumstance limited the availability of appellate relief to the state; that appeal was moot only because New York voluntarily chose to abandon its interest in vindicating the original judgment. As discussed above, in this case California refuses to relinquish its interest in its appeal.

In sum, the Ninth Circuit has reached the indefensible conclusion that the state moots its pending appeal by granting a defendant a new trial in good faith compliance with a district court's unstayed order requiring a choice between retrial and release. However, this rule thwarts the state's right to defend its most serious criminal judgments. The state's paramount obligation to protect the public compels it to choose retrial in every case where the defendant has committed crimes of violence -- which includes all capital cases. Under the Ninth Circuit application of mootness, that choice divests the state of its statutory appellate rights,

thereby making unreviewable a district judge's order striking down a state judgment. Such an application ransoms public safety for the price of the state's right to appeal. In the process, the finality of state judgments is eroded, along with the most basic notions of comity and respect for the sovereign efforts of a coextensive state judiciary.

Certiorari is essential to establish that the state has a live interest in defending its judgments beyond the level of the district court. Regardless of the outcome of a retrial, the federal appellate court can grant "effectual relief" by reinstating the original state court judgment on appeal. This Court should grant the petition in order to resolve this important question of mootness.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: March 21, 1996.

Respectfully submitted,

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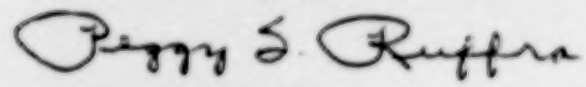

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APPENDIX A

Filed December 28, 1995
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The State of California has granted petitioner Charles Edward Moore, Jr., a new trial. Accordingly, this appeal is DISMISSED as moot.

APPENDIX B

Filed January 10, 1996
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	AMENDED ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The State of California has granted petitioner Charles Edward Moore, Jr. a new trial. Accordingly, these appeals are DISMISSED as moot.

APPENDIX C

Filed March 5, 1996
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Ferguson has so recommended.

The full court has been advised of the en banc

suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ARTHUR CALDERON, Warden, *Petitioner*

v.

CHARLES EDWARD MOORE, JR., *Respondent*

CERTIFICATE OF SERVICE BY MAIL

THOMAS A. BRADY, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on March 22, 1996, he served three true copies of the Petition for Writ of Certiorari in the above-entitled matter on the respondent by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

Thomas A Brady

THOMAS A. BRADY
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Supreme Court, U.S.
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No. 95-1612

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ARTHUR CALDERON, WARDEN,

Petitioner,

v.

CHARLES EDWARD MOORE, JR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

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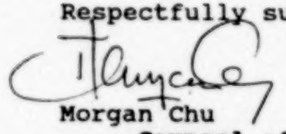
MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Charles Edward Moore, asks leave to proceed *in forma pauperis* and to file the attached brief in opposition in conformity with Supreme Court Rule 33.2. Respondent has not sought leave to proceed *in forma pauperis* in either the United States District Court or the United States Court of Appeals. No affidavit is attached, inasmuch as the United States District Court appointed counsel for the respondent under the Criminal Justice Act of 1964.

Dated: May 8, 1996

Respectfully submitted,



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Supreme Court, U.S.
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No. 95-1612

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ARTHUR CALDERON, WARDEN,

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v.

CHARLES EDWARD MOORE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Where a habeas corpus petitioner succeeds in obtaining relief from a district court in the form of an order requiring release or retrial within sixty days, and where, as a result of the state's inability to show a substantial likelihood of success on the merits on appeal, the state's requests for a stay of the order are denied by three courts, including this Court, may the Court of Appeals exercise its discretion to dismiss the appeal on prudential mootness grounds?

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OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit dismissing the State's appeal is unpublished but is appended to the Petition for Writ of *Certiorari* as Appendix A.[1] The district court's Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B and C (Mem. Op.) which required release or retrial within sixty days is included in Respondent's Appendices as Respondent's Appendix A.

The order of the district court denying a stay pending appeal is appended as Respondent's Appendix B. The Ninth Circuit's denial of a stay is reported as *Moore v. Calderon*, 56 F.3d 39 (9th Cir. 1995), and is appended as Respondent's Appendix C. The denial of a stay pending appeal by Justice O'Connor sitting as Circuit Justice is appended as Respondent's Appendix D.

[1] References to the Appendices contained in the Petition are identified herein as Appendix A, B, etc. References to the Respondents' Appendices contained in this Brief in Opposition are identified herein as Respondent's Appendix A, Respondent's Appendix B, etc.

PROVISIONS INVOLVED

None. Article III, Section 2 of the United States Constitution need not be reached in this case. Rather, the Ninth Circuit's decision is sustainable on non-constitutional grounds which should be considered before any constitutional questions.

STATEMENT OF THE CASE

A. Procedural Background.

On March 31, 1995, the district court granted Charles Edward Moore summary judgment on Claims A and C of his habeas corpus petition, both of which addressed Moore's invocation of his Sixth Amendment self-representation right, while denying Moore's motion for summary judgment on Claim B. *See* Respondent's Appendix A (Mem. Op.).[2]

Under Claim A, the district court held that the state trial court unconstitutionally denied Moore his Sixth Amendment right to represent himself, a right recognized by this Court in *Faretta v. California*, 422 U.S. 806 (1975), by denying his self-representation motion without adequately inquiring into the purpose for which the motion was brought. Under Claim C, the district court held that the trial court also improperly denied Moore his *Faretta* right when he renewed his motion to represent himself prior to closing argument. The district court issued a conditional order requiring that

[2] Moore filed his habeas corpus petition in the United States District Court for the Central District of California on November 1, 1991, seeking relief from his 1984 conviction and death sentence which had become final in March of 1990.

Moore be released if California failed to grant him a new trial within sixty days.

Almost four weeks later, on April 27, 1995, the State filed a Notice of Appeal and also moved in the district court for a stay pending appeal. The district court denied the motion on May 4, 1995. Twelve days later, on May 16, the State filed an "emergency motion" for a stay pending appeal with the Ninth Circuit. On May 26, 1995, the Ninth Circuit denied the motion, finding that, based on controlling Ninth Circuit precedent, the State could not demonstrate that it had a substantial case on the merits. *See* Respondent's Appendix C (56 F.3d 39). The State then filed its Application For Stay Pending Disposition of Appeal in Ninth Circuit with this Court on May 27, 1995. The State's third request for a stay of the district court's order granting habeas relief was likewise rejected by Justice O'Connor sitting as Circuit Justice. Respondent's Appendix D.

On July 11, 1995 the Ninth Circuit issued an order requiring the State to inform the court whether Moore had been granted a new trial. Respondent's Appendix E. The State responded, indicating that Moore had been "granted . . . a new trial on May 30, 1995." Respondent's Appendix F at F1-F2.[3]

[3] The "grant" of a retrial to Moore On May 30, 1995 apparently entailed "calendar[ing] the matter for a trial setting conference on June 13, 1995, and obtain[ing] a removal order for Moore for that date." Respondent's Appendix H at H2 (Reply to Moore's Opposition to Calderon's Application for Stay Pending Disposition of Appeal in Ninth Circuit, filed June 6, 1995, at 1). Respondent does not concede that this action was sufficient to constitute compliance with the (continued...)

The State also informed the court of the status of pre-trial proceedings in the retrial. *Id.* The State updated the Ninth Circuit as to the status of the pre-trial proceedings in the retrial on September 21, 1995. Respondent's Appendix G. The Ninth Circuit dismissed the State's appeal as moot because "[t]he State of California has granted petitioner Charles Edward Moore a new trial." Appendices A and B. After denial of rehearing and rehearing *en banc* the State filed the present petition.

B. <u>Factual Background</u>.

Moore was tried for capital murder solely on the basis of the testimony of Terry Avery, an admitted participant in the two killings for which Moore was tried and received the death penalty, but who nevertheless was granted full immunity from prosecution in exchange for her testimony against Moore and another defendant, Lee Edward Harris.[4] Moore's court-appointed attorney did not vigorously pursue Moore's defense. The undisputed facts before the district court demonstrate that, as soon as Moore realized that his attorney was not prepared for trial and had not even bothered to interview a key witness with potentially exculpatory testimony, Moore

[3](...continued)
district court's order requiring release or retrial within sixty days.

[4] Harris received a life sentence upon his retrial. *People v. Moore*, 47 Cal. 3d 63, 93, 762 P.2d 1218, 1236, 252 Cal. Rptr. 494, 512 (1988), *cert. denied*, 490 U.S. 1095 (1989).

resolved to proceed *pro se*, to seek another court-appointed lawyer, or to be granted co-counsel status.

At the two pre-trial hearings following this decision, Moore was left in his holding cell and was unable to present his request to the court. On March 10, 1984, after Moore was left in his cell for the second consecutive hearing, he wrote to the court directly and asked unequivocally to be allowed to represent himself, to participate as co-counsel, or to have another attorney appointed.[5]

On March 16, 1984, at the next pre-trial hearing at which Moore was present, Moore's requests for co-counsel status and to have another attorney appointed were denied. Recognizing that Moore wanted to proceed *pro se*, the master calendar court then gave Moore relevant forms to fill out and continued the hearing until March 19, 1984. On that date, the court denied Moore's self-representation motion without inquiring of Moore about his *Faretta* demand. The court also ruled against Moore without making any finding -- express or implied -- that Moore had any dilatory intent or harbored any improper purpose in choosing to exercise his self-representation right. *See* Appendix A at A45-A50 (Mem. Op. at 45-50). Following the master calendar court's ruling, the case was transferred to the trial court, where, that afternoon, trial was continued in

[5] Moore's March 10 letter to the court stated, "I ask that the court appoint me co-counsel with another lawyer or allow me to go pro. per., which is my constitutional right of 'self-representation' under the Sixth Amendment. *Faretta v. Calif.*, 422 U.S." *See* Respondent's Appendix A n.31 (Mem. Op. n.31).

order to permit the court to consider two pre-trial motions and to permit the prosecution to secure the presence of out-of-state witnesses. After two additional continuances, jury selection did not begin until one week later, March 26, and the jury was not empaneled until March 29.

As the district court correctly found, directly applicable Ninth Circuit precedent establishes that the denial of Moore's right to represent himself was constitutional error as a matter of law; indeed, this precedent was established by 1982, well before Moore was even brought to trial. In addition, the district court found that, under not only the Ninth Circuit test but also under *any* of the similar timeliness tests that have emerged around the country, the denial of Moore's self-representation motion was improper.

Moore's concern regarding his lawyer proved to be well founded. At trial, Moore's attorney, Ronald Slick, was unprepared to cross-examine Terry Avery or Mr. Jones, the witness whom he had failed to interview. Given Slick's failures, prior to closing argument Moore renewed his request to represent himself during closing argument. As the district court found, this motion also was improperly denied.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Because the Ninth Circuit's Unpublished Dismissal of This Appeal Resulted from Facts Unique to This Case, This Case Is Not Sufficiently Compelling to Merit a Grant of *Certiorari*.

1. The circumstances here are merely episodic -- so few habeas petitioners obtain unstayed orders compelling retrial that review in this case would affect only a few litigants.

A petition for certiorari should be granted only "for compelling reasons." Supreme Court Rule 10. In order to merit review by this Court, the problem must be "beyond the academic or the *episodic*." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (emphasis added).

While Petitioner claims that this case presents an issue of "critical national importance," Petition at 5, Petitioner's own argument refutes that contention. Petitioner refers to "only one case remotely comparable" to the present case, *Johnson v. Smith*, 764 F.2d 114 (2d Cir. 1985), a case that is *contrary* to Petitioner's position, which Petitioner then goes to great, though unsuccessful, lengths to distinguish. Petition at 9-10. While Petitioner's claim that review in this case will affect "every case" involving an order granting habeas corpus relief in the form of retrial for which a stay pending appeal is denied is correct, Petitioner's own research demonstrates that this class of cases is an exceedingly narrow one.[6]

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[6] Petitioner cites only one other case either prior to or in the eleven years subsequent to the decision in *Johnson*, in which a court was faced with a similar question of mootness engendered by retrial. In that case, *Garrison v. Hudson* 468 (continued...)

The reasons why such circumstances are so rare is apparent upon examination of the unique history of this case: Upon the issuance by the district court of its March 31, 1995, Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B and C, (the "District Court's Order") requiring release or retrial within sixty days, the State applied for a stay pending determination of the appeal by the Ninth Circuit. The district court denied the application because there was not a substantial likelihood that the State would prevail on the merits in the Ninth Circuit. The State then appealed to the Ninth Circuit which denied the motion for a stay stating that the State had not met its burden of "'demonstrat[ing] a substantial case on the merits'" Respondent's Appendix C at C2 (*Moore v. Calderon*, 56 F.3d 39, 40 (9th Cir. 1995) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987))). Finally, a stay pending appeal was likewise denied by Justice O'Connor sitting as Circuit Justice. Respondent's Appendix D.

It was only after two courts found that the State had failed to show a substantial likelihood of success on the merits, and while the State's third unsuccessful stay request was pending before this Court, that the State finally chose

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[6](...continued)
U.S. 1301 (Burger, Circuit Justice 1984), Chief Justice Burger, recognized the potential mooting effect of retrial on a state's habeas appeal, and, on that basis, granted a stay of the habeas order.

among beginning retrial proceedings,[7] "releasing" Moore,[8] or refusing to comply with the District Court's Order.[9] Had any one of the three courts addressed been convinced that the State's case on appeal warranted a stay of the remedy to which the district court found Moore was undoubtedly entitled, the State would not have been obliged to begin retrial proceedings until after the appeal of this case had been finally determined on the merits. The Ninth Circuit only dismissed the appeal after the State chose, in light of the three denials of stays, to subject itself and Moore to relitigation in state court of the question of Moore's guilt or innocence concurrently with appellate litigation of this habeas corpus case. It was only this extraordinary chain of events which presented the Ninth Circuit with the decision of whether to review the District Court's Order on the slight chance that the State would prevail, and prevail before the second trial occurred. The Ninth Circuit's decision is not relevant to the vast majority of habeas cases in which relief is denied by the

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[7] The State took the action it contends constitutes compliance with the District Court's Order on May 30, 1995, the sixtieth day after the issuance of the District Court's Order. This last-minute "action was taken subject to the issuance [by this Court] of a stay pending the final disposition of the Ninth Circuit appeal." Respondent's Appendix H at H2 (Reply to Moore's Opposition to Calderon's Application for Stay Pending Disposition of Appeal in Ninth Circuit, filed June 6, 1995 at 1).

[8] "Release" in this case would not, as Petitioner implies, release a dangerous person into the community. *See infra* at 10-11.

[9] The State's options in this regard are discussed more fully *infra* at 11-12.

district court or in which relief is granted, but stayed pending appeal (thereby avoiding retrial concurrent with appeal).[10]

2. The State was not faced with any purported "dilemma" -- the State had options that allowed it both to ensure decision on the merits of its appeal and avoid any danger to the community.

In addition to affecting very few other litigants, this case does not present the purported "dilemma" to the State of California which Petitioner asserts it does. Petitioner describes the State as being put in the position of having to choose between "releas[ing] a dangerous capital defendant" and "forfeit[ing] its right to appeal." Petition at 4. No such dilemma existed. Moore is currently subject to a thirty year sentence in the State of Colorado. Upon completion of this Colorado sentence, Moore must serve consecutively a life sentence and two thirty-years-to-life sentences in Kansas.[11] Each of these states has an obviously strong interest in acquiring custody of Moore in the event that his release from California's custody were to become imminent. Thus, it is inaccurate and misleading for Petitioner to imply that the State would have been forced to release a "dangerous capital

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[10] Not only is the issue raised here relevant to only a very few other cases, but the decision below has *no* effect on other litigants. Because it is unpublished, the decision is *not* binding precedent, and may not be cited, within the Ninth Circuit. *See* Ninth Circuit Rule 36-3.

[11] The reason that no detainer has been lodged against Moore is that he was brought to California from Colorado on a detainer and is thus still technically serving his sentence in Colorado during his incarceration on this case.

defendant" into the community in order to fully maintain its appellate options.[12]

Petitioner's claimed dilemma also ignores a third, viable option always open to the State -- refusal to comply with the order. Refusal to comply with a court's order granting habeas relief is an acceptable means by which to maintain the *status quo* and preserve all issues for appellate review. *Burnett v. Kindt*, 780 F.2d 952 (11th Cir. 1986); *see also Pierce v. Winograd*, 757 F.2d 714, 716 (5th Cir. 1985) ("A good faith test of the court's order through contempt would have implied no disrespect toward the court.")

In *Burnett*, the district court ordered the warden in whose custody Burnett was held to produce Burnett for a parole hearing. The warden did not seek a stay of the Court's order but complied while simultaneously pursuing an appeal. Burnett was paroled and released as a result of the hearing. The Eleventh Circuit dismissed the case as moot because a favorable ruling "would do nothing more than answer a hypothetical question" in light of the habeas petitioner's release. *Burnett* 780 F.2d at 954. The *Burnett* court explained that the warden could have maintained a live controversy in one of two ways: He could have obtained a stay, or "refused to comply with the district court's

[12] Though Judge O'Scannlain, in his dissent to the Ninth Circuit's denial of a stay, also expressed concern over the danger posed by Moore's release, Respondent's Appendix C at C3 (59 F.3d at 41), this was only because the State failed to inform the court of the convictions outstanding in other jurisdictions.

injunctive order, undergone a contempt adjudication, and challenged the validity of the injunctive order in an appeal from the contempt adjudication." *Id.* at 955.

In the case at bar, as in *Burnett*, the State could have assured itself of appellate consideration of all issues via a good faith refusal to comply with the District Court's Order. Moreover, Petitioner had the additional option not open to the warden in *Burnett* of "releasing" the habeas petitioner to serve lifelong terms of incarceration in other jurisdictions while the appeal went forward. Thus, on the facts of this case, there were two alternatives open to the State which would have accomplished both of the State's goals -- protecting the public from any possible danger and protecting the State's ability to continue litigating the constitutionality of Moore's conviction. The dilemma posed by Petitioner does not exist.

B. <u>There Is No Conflict Among the Circuits Regarding the Question Presented in This Case</u>.

The existence of a conflict between circuits, between state courts of last resort or between a circuit and state court of last resort is an important factor in determining whether a case is worthy of review by this Court. *See* Supreme Court Rule 10. In this case no such conflict exists.[13]

[13] Petitioner attempts to divert this Court's attention from the fact that no conflict exists over the only issue presented to this court for review -- mootness -- by describing a purported conflict between the Ninth Circuit and the Supreme Court of California. Petition at 9 n.5. This is the reddest of herrings: the purported conflict described involves the issue of the timeliness of a motion for self-

(continued...)

Petitioner cites only two cases involving the mootness of a state's habeas appeal in light of the subsequent retrial of the habeas petitioner. Both of those cases, *Garrison v. Hudson* 468 U.S. 1301 (Burger, Circuit Justice 1984) and *Johnson v. Smith*, 764 F.2d 114 (2d Cir. 1985), are in accord with the decision below.

In *Garrison*, the Fourth Circuit reversed the decision of the district court denying relief and directed the district court to issue a writ of habeas corpus requiring release or retrial. The warden and the state of North Carolina filed a petition for *certiorari* and an application for a stay of the scheduled retrial. Chief Justice Burger, sitting as Circuit Justice, granted the stay of the retrial holding that inasmuch as the certiorari petition filed in July would not normally be considered until October, "[r]etrial of respondent . . . prior to the 'first Monday in October' would effectively deprive this Court of jurisdiction to consider the petition." *Garrison*, 468 U.S. at 1302. Chief Justice Burger recognized that retrial would moot the appeal in the habeas case and would thus "irreparabl[y] harm" the state. *Id.*

Likewise, in *Johnson*, the district court granted the habeas petitioner relief in the form of an order requiring the State of New York to release or retry the petitioner within seventy-five days. New York appealed and the petitioner cross-appealed on a claim of error which the district court

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[13](...continued)
representation, not the question of mootness presented for this Court's review. *See* Petition at 2.

had rejected. New York sought a stay from the district court and from the Second Circuit but was refused each time. New York then chose to comply with the order, and retried the defendant who was again convicted. The Second Circuit held that "once retrial occurred, the appeal became moot, as did the cross-appeal since they both raised hypothetical issues, the earlier trial no longer being the cause of Johnson's incarceration." *Johnson*, 764 F.2d at 116. Petitioner cites no contrary authority. Instead, Petitioner relies on its bald assertion that in dismissing the state's appeal as moot, the *Johnson* court "stumbled." Petition at 11. Petitioner's unsupported contention of error notwithstanding, the appeal in *Johnson* was correctly dismissed as moot because the court could not return the parties to the *status quo ante* given that the order had been completely complied with, the habeas petitioner had been subjected to another trial, and that trial had become the source of his confinement.

Although the issue of the mooting effect of compliance with an unstayed habeas order only rarely faces courts, the courts which have faced the issue have uniformly recognized that retrial will moot an appeal from the grant of habeas relief which led to that retrial. Because Petitioner's argument is contrary to this uniform authority, the Petition should be denied.

C. **The Ninth Circuit's Decision Does Not Necessarily Implicate Any Constitutional Provision -- Its Decision Was a Correct Exercise of Its Discretion to Dismiss for Prudential Reasons.**

Petitioner seeks review of the Ninth Circuit's order dismissing the appeal as moot claiming that the Ninth Circuit incorrectly held the case moot under Article III, Section 2 of the Constitution. While the Ninth Circuit did dismiss the appeal as moot, the two-sentence order does not make clear the legal basis of that mootness. It is well settled that "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981)). Moreover, in considering the petition for review of the Ninth Circuit's decision, this Court should follow its own maxim: "[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 854 (quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

Petitioner asserts that the basis of the decision was the case or controversy requirement of Article III of the Constitution, but it actually appears that the Ninth Circuit exercised self-restraint on *prudential* rather than constitutional grounds. Therefore, because the dismissal should be sustained as a proper exercise of the Ninth Circuit's prudential discretion, this Court need not and should not decide the constitutional question of mootness

under Article III. Moreover, in light of the absence of a constitutional question, this case certainly does not merit review.

In addition to the "case or controversy" requirement of Article III, the doctrine of mootness includes a distinct branch "relating to the court's discretion in matters of remedy and judicial administration." *Chamber of Commerce v. United States Dept. of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980); *See also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 420 n.15 (J. Powell dissenting) ("This Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines."); *S-1 & S-2 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987) ("The discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot is well established."); 13A Charles A. Wright et. al., Federal Practice and Procedure § 3533.1 at 222 (2d ed. 1984) ("Beyond the Article III core, mootness decisions frequently reflect avowedly flexible doctrines of remedy and judicial administration.").

This second branch of mootness doctrine, sometimes termed "prudential mootness," *e.g. Penthouse Int'l., Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992), is grounded in this Court's decision, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In *W.T. Grant*, this Court held that even in a case which is not technically moot (in an Article III sense), a court may, in

its discretion, refrain from granting relief. *See Chamber of Commerce*, 627 F.2d at 291-92 (describing the development of the prudential mootness doctrine); *S-1 & S-2 v. Spangler*, 832 F.2d at 297 (relying on *W.T. Grant* to withhold relief "for prudential reasons").

The plaintiff in *Chamber of Commerce* sought an injunction and declaratory relief against the Department of Energy's provision of funds to a consumer group so that the group could intervene in one of the Department's regulatory proceedings. The plaintiff was denied a temporary restraining order and the Department of Energy's hearing proceeded with the consumer group's funded intervention. The district court dismissed the case as moot and the District of Columbia Circuit affirmed, but did so on prudential rather than constitutional grounds. *Chamber of Commerce*, 627 F.2d at 292. The court explained that a court's discretion not to exercise its power to grant relief is guided by principles of "prudence" and of "comity for coordinate branches of government." *Id.* at 291.

Principles of comity apply not only to other branches of the federal government but also to state courts. This Court has relied on these principles in determining that federal courts should not interfere with pending state criminal proceedings:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971). The *Younger* court went on to reverse the district court's grant of an injunction against a state criminal proceeding in light of the lack of a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54.

While *Younger* is not directly controlling inasmuch as the retrial was not pending at the time of the institution of this habeas proceeding, the concerns raised are analogous. The State seeks to terminate retrial proceedings currently underway in state court. As evidenced by *Younger*, federal courts should be reluctant to engage in the practice of interfering with ongoing state court proceedings. The Ninth Circuit's dismissal of the appeal in this case implicitly recognized the damage that would be done to principles of comity by ordering the State to retry Moore only to withdraw the case from the state court's consideration after proceedings were underway. Thus, the Ninth Circuit properly exercised its discretion to refuse to interfere with the state court proceedings based on prudential concerns.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Dated: May 8, 1996

Respectfully submitted,

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APPENDIX A

CLERK, U.S. DISTRICT COURT
MAR 31
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

CONSTITUTES NOTICE OF ENTRY
QUIRED BY FRCP, RULE 77(d).

FILED
CLERK, U.S. DISTRICT COURT
MAR 31 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES EDWARD MOORE, JR., Petitioner, v. ARTHUR CALDERON, Warden, Respondent.	CASE NO. CV 91-5976 KN **DEATH PENALTY** MEMORANDUM DECISION AND ORDER ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS A, B, AND C

INTRODUCTION

Having reviewed and considered the supporting and opposing papers, the relevant portions of the state record, and the other papers, pleadings, and records on file herein, for the reasons explained below, the Court **GRANTS** the petition.

RELEVANT FACTS AND PROCEDURAL POSTURE

The facts relevant to the underlying claims have been culled from the state court record and are addressed in the body of this memorandum decision. While the Attorney General contests summary judgment in favor of Moore, he does not suggest that any factual

issues are in dispute,[1] confining his argument to questions of law. Thus, although the parties disagree as to some of the inferences to be drawn, they do not dispute the underlying facts.

Throughout the pleading stage, Moore repeatedly asserted that his petition included claims that could be resolved on summary judgment based on the current record and without any need for discovery. Respondent concedes that summary judgment is an appropriate method for disposing of these claims. Blackledge v. Allison, 431 U.S. 63, 80 (1977).[2] His opposition is based solely on the contention that the claims, as pleaded, are insufficient as a matter of law and/or refuted by the state court record. He has disclaimed any intent to supplement the state court record.

While now moving for summary judgment, Moore has never disclaimed an intent to seek discovery and/or an evidentiary hearing to reinforce his factual contentions if this Court were to find that the state court record does not establish his claims as a matter of law. Moore has not been required to present all his evidence at this time; it would be inappropriate for this Court to pretermit briefing on the factual necessity of an evidentiary hearing. Contrary to Respondent's suggestion, the Court cannot summarily adjudicate factual issues adverse to Moore in this situation. Starsky v. Williams, 512 F.2d 109, 112 (9th Cir. 1975); Hotel del Coronado Corp. v. Foodservice Equip.

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1. There is, for example, no statement of genuine issues as required by Local Rule 7.14.2.

2. The Attorney General has filed a cross-motion for summary judgment. Since he set no hearing date or briefing schedule, the cross-motion has not required any opposition, Local Rule 7.4, and remains unbriefed.

Distrib. Ass'n, 783 F.2d 1323, 1325 n.1 (9th Cir. 1986).[3]

As to the claims that, as presented, raise pure questions of law, however, Moore should have been well aware that the Court has authority to, sua sponte, summarily adjudicate issues adversely to him. Cool Fuel, Inc. v. Conett, 685 F.2d 309, 311-12 (9th Cir. 1982); Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869-70 (9th Cir. 1985).

ANALYSIS

I. Moore's Absence from the March 5 and March 9 Hearings Did Not Transgress Upon his Fifth or Sixth Amendment Rights

A. Retroactivity Concerns

More than a half-century ago, the United States Supreme Court affirmed that the due process clause protects a criminal defendant's right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).

Invocation of this long-standing rule does not raise habeas retroactivity concerns. The "rule of constitutional criminal procedure" involved is not "new." Cf. Teague v. Lane, 489 U.S. 288 (1989) (plurality). Moore seeks only to have an old rule applied to a setting which has never before been directly confronted in a published decision -- a State's exclusion of a criminal defendant from a calendar call where defense counsel

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3. The Attorney General alternatively suggests that the claims should be summarily dismissed. Not only has the time and stage for summary dismissal ended, Rule 4, Rules Governing Section 2254 Cases, but such treatment would be plainly inappropriate in this case. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

announces "ready for trial."

The mere fact that no published case has ever confronted this precise situation and held that the government's conduct violated constitutional norms does not establish that a holding in favor of Moore would be a "new rule of law." No more so, at least, than it could be said to establish that the State's actions here were so unconventional that they can be summarily condemned as contrary to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder, 291 U.S. at 105.

Teague makes no pretense of prohibiting the federal courts from applying well-established rules and precedent unless the ultimate result "is so novel that it forges a new rule." Wright v. West, 112 S.Ct. 2482, 2499 (1992) (Kennedy, J., concurring). The right to be present at "all critical stages of the proceedings" is just such a rule of general application. To accept Respondent's construction of Teague would improperly abdicate this Court's duty to review de novo questions of law and mixed questions of fact and law and virtually eviscerate habeas review. Shiro v. Farley, 114 S.Ct. 783, 790 (1994); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980).

B. Application of Moore's Right to be Present

The right to be present extends to all "critical stages of the proceedings." As more recently explained in Kentucky v. Stincer, 482 U.S. 730 (1987), which, it is noted parenthetically, was also decided before Moore's judgment became final:

> Although the Court has emphasized that this privilege of presence is not guaranteed "when presence would be useless, or the benefit but a mere shadow," due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Stincer, 482 U.S. at 745 (internal citations omitted) (quoting Snyder, 291 U.S. at 106-07, 108).

Judicial analysis has "emphasize[d] . . . the particular nature of the . . . hearing" at issue, paying close attention to the potential benefit to the defendant that could be gained by his personal presence. Stincer, 482 U.S. at 745; Rice v. Wood, 44 F.3d 1396, 1401-02 (9th Cir. 1995). In United States v. Gagnon, 470 U.S. 522 (1985), for example, the Court was heavily influenced by the fact that the criminal defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." Id., 470 U.S. at 527.[4]

Moore argues that "a fair and just hearing . . . [was] thwarted by his absence" from the calendar calls when Slick announced "ready."[5] He argues that his presence was necessary to enable him to make his motion for self-representation at one of those conferences -- a time, according to him, when the trial court would have recognized its obligation to grant his request.

The defect with this argument is in its perspective. Moore

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4. Accord Snyder, 291 U.S. at 108; United States v. Veatch, 674 F.2d 1217, 1226 (9th Cir. 1981), cert. denied, 456 U.S. 946 (1982); Bustamante v. Eyman, 456 F.2d 269, 274-75 (9th Cir. 1972); Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986). Cf. Rice, 44 F.3d at 1401-02.

5. Slick did not announce on the record that he was ready for trial at either the March 5 or March 9 conference. That he did so off the record and did not need additional preparation time, however, can be inferred from the fact that he did not ask for a continuance beyond the few days requested by the prosecution.

approaches the issue with post hoc omniscience. Whether the defendant has a right to be present at a particular proceeding significantly depends upon "the particular nature of the . . . hearing" and the benefits that could be gained by the defendant's participation. Shifting the focus to a retrospective inquiry of what might have transpired in light of subsequent events, if the defendant had been present earlier, deprives judges, prosecutors, and defense attorneys of knowing whether they are required to have the defendant in court before they can proceed. Adopting Moore's analysis would effectively mandate that defendants be present at every possible stage of the proceedings, even those which they voluntarily choose not to attend, irrespective of the significance or importance of the individual proceeding itself.

Moore's approach overlooks the distinctions drawn by the other cases. Every hearing would be a "critical stage" because every hearing would be an opportunity where, had the defendants been so disposed, they could have requested self-representation. Under Moore's analysis, even Stincer, for example, would have been decided differently because, although Stincer never did request self-representation, he might have done so at that time.

Moore insinuates that it is Kafkaesque to find that he was properly excluded from the calendar calls while simultaneously holding that his self-representation motion was too late because it should have been presented at the calendar call. The harm here, however, arose not because Moore was absent from the calendar calls on March 5 and March 9, but because the master calendar court failed to respect the fact that Moore's motion was being made at his first opportunity to address the court after

the upheaval in the relationship with his attorney.

II. The Record Does Not Conclusively Establish that the Trial Court Improperly Denied Moore's Motion to Substitute Counsel

"The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel and thus is properly considered in [a] habeas proceeding." Bland v. California Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir.), cert. denied, 115 S.Ct. 357 (1994). As explained a quarter-century ago in Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970), "to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." Brown, 424 F.2d at 1170; accord Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

The trial court's ruling, however, will only be set aside for an abuse of discretion. As the Ninth Circuit explained:

> When reviewing the denial of a motion to substitute counsel for abuse of discretion, we consider the following three factors: "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense."

Bland, 20 F.3d at 1475 (quoting United States v. Walker, 915 F.2d 480, 482 (9th Cir. 1990)).

The parties agree that the motion was not denied as untimely and, therefore, that the timeliness of the motion is not an issue on habeas review. Bland, 20 F.3d at 1476; cf. Walker, 915 F.2d at 482. The parties' disputes focus on the other two factors -- whether the trial court's inquiry was adequate and whether, on

its face, the record establishes a conflict so great that substitution of counsel was required.

A. Adequacy of the Trial Court's Inquiry

"When a defendant indicates dissatisfaction with his counsel, the trial court ordinarily must conduct a thorough inquiry in order to discover whether the situation is depriving the defendant of an adequate defense." King v. Rowland, 977 F.2d 1354, 1357 (9th Cir. 1992); accord United States v. Robinson, 913 F.2d 712, 716 (9th Cir. 1990), cert. denied, 498 U.S. 1104 (1991). Although thorough, the inquiry need not be exhaustive; it "need only be 'as comprehensive as the circumstances reasonably would permit.'" King, 977 F.2d at 1357 (quoting Hudson, 686 F.2d at 831).[6]

In light of Hudson and McClendon, it is clear that the master calendar judge's inquiry was more than sufficient. True, unlike McClendon and Hudson, the master calendar judge was not intimately familiar with the case. He accommodated for this, however, by asking a broad range of questions, soliciting further complaints until Moore said that he had no others.[7] Whatever may

[6] Whatever the constitutional minimum might be, the Ninth Circuit has clearly rejected the possibility that such a motion may be denied without any inquiry. In every instance where the motion was met with a summary rejection, the Ninth Circuit has summarily reversed. E.g. Bland, 20 F.3d at 1475; United States v. Torres-Rodriguez, 930 F.2d 1375, 1381 (9th Cir. 1991); Walker, 915 F.2d at 483; Brown, 424 F.2d at 1170. Beyond rejecting the possibility that such motions can be summarily denied, however, the Ninth Circuit has not definitively established any minimum level of discussion. E.g. Hudson, 686 F.2d at 828 & n.1, 831; United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986).

[7] Further, while no substitute for further inquiry, the judge undoubtedly benefitted from Moore's letter that briefly outlined the substance of his complaints. Cf. Walker, 915 F.2d at 482.

be said about the court's assessment of the facts, the court cannot be criticized as not having been adequately informed.

Since, as the court acknowledged, it knew little about the facts and circumstances of the case, it had an obligation to ferret out the information to enable it to make a reasoned analysis of the extent of the conflict. Cf. Hudson, 686 F.2d at 831. It clearly did so. The court questioned Moore about every complaint and frequently asked Slick to explain his actions. The court did not stop asking Moore about his complaints until Moore himself said that he had expressed all the complaints that he had. The canvass undertaken here is a far cry from the summary rejections involved in Bland, Brown, and Torres-Rodriguez. Moore identifies nothing concrete about which the master calendar judge failed to inquire. On the basis of the current record, the inquiry was constitutionally sufficient.[8]

Moreover, the adequacy of the trial court's inquiry is not the type of claim for which the record can be supplemented prior to being resolved. Rather, like sufficiency of the evidence, the trial court's inquiry was either adequate or it was not. Any comments in the way of further or additional questions will be received by way of argument. Dallas v. Arave, 984 F.2d 292, 296 (9th Cir. 1993). By way of these summary judgment proceedings,

[8] The Attorney General argues that the state appellate court's approval of the trial court's inquiry is a question of fact entitled to the presumption of correctness. This borders on frivolous. Cf. 28 U.S.C. § 2254(d). What the trial court did and did not ask are the type of "basic, primary, or historical" facts entitled to the presumption. Cuyler, 446 U.S. at 342. Whether the trial court's inquiry was "adequate" is a mixed question of fact and law, reviewed de novo. Sumner v. Mata, 455 U.S. 591, 597 (1982).

Moore has had a full opportunity to present his arguments regarding the trial court's inquiry on his motion for substitution of counsel. These arguments are unpersuasive. The Court not only denies Moore's motion for summary judgment on this aspect of the claim, but also sua sponte summarily adjudicates this issue adversely to Moore.

B. Extent of the Conflict

In only limited situations will substitution of counsel be constitutionally required. As the Supreme Court has made clear, the Sixth Amendment right to counsel does not encompass a right to develop a "meaningful relationship" with one's attorney. Morris v. Slappy, 461 U.S. 1, 14 (1983). Nonetheless, the quality of the relationship is not wholly outside the scope of the Sixth Amendment's concerns. As quoted above, the Ninth Circuit long ago confirmed that the constitutional right to assistance of counsel is effectively denied when a defendant is forced into trial while represented by a lawyer with whom he "has become embroiled in irreconcilable conflict." Brown, 424 F.2d at 1170; accord Hudson, 686 F.2d at 829; Frazer v. United States, 18 F.3d 778, 783-84 (9th Cir. 1994).

The threshold for establishing "irreconcilable conflict," however, is quite high. In order to establish that substitution of counsel is necessary, the defendant must demonstrate either that there was a legal conflict of interest, e.g. United States v. Rewald, 889 F.2d 836, 858 (9th Cir. 1989), amended, 902 F.2d 18, cert. denied, 498 U.S. 819 (1990), or that the "'[personal] conflict . . . was so great that it resulted in a total lack of communication preventing an adequate defense.'" Bland, 20 F.3d at

1475 (quoting Walker, 915 F.2d at 482).

Moore does not claim that his relationship with Slick was burdened by a conflict of interest. Rather, he complains that his relationship had deteriorated to the point where substitution of counsel was constitutionally required. As such, he must satisfy the stringent standard employed by the Ninth Circuit. On this record, Moore has failed to do so.

From a review of the record, it appears that Moore had three basic complaints about Slick. First, Moore complained about his lack of communication with Slick. Second, Moore feared that Slick had not adequately prepared for the trial. Finally, Moore complained that he had lost all trust in Slick, primarily as a result of Slick's having abandoned him in the holding cell during the March 5 and March 9 status conferences. Moore does not now claim that there were any other disputes with Slick or his performance that were not identified at the March 16 hearing.

1. Adequacy of Communication[9]

As to the sufficiency of Slick's and Moore's communication, the trial court certainly could have more thoroughly investigated the underlying facts. Because of the limited inquiry, the underlying facts are unclear and, as a result, this Court's review is "somewhat hampered." Bland, 20 F.3d at 1477.

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[9] This complaint cannot be so glibly dismissed as a whimpering demand for "more" communication simply because Moore had "some" communication with Slick. Indeed, if it could be, no absence of communication could ever be sufficiently severe. Any defendant complaining of a "total lack of communication" is probably seeking "more." Many a defendant entitled to substitution of counsel may well have had "some" communication. Finally, the Attorney General suggests no guidance for its rhetorical "'some' communication" standard.

The trial court was presented with two different visions of the communication that had taken place between Moore and Slick. Moore initially complained that Slick "didn't really explain to me the defense he plans to organize on my behalf." Although the judge expressed reluctance about inquiring into the substance of the conversations, he did ask Slick whether the conclusion was accurate. Slick responded that he had "told him what I think will fly. And I -- what I think won't fly."

While the master calendar judge was apparently satisfied with this response, Moore clearly was not. When asked whether Slick's explanation was accurate, Moore clarified that Slick had only talked to him "about one part of Terry Avery's statement, and that was all. . . . [¶] About how many times she was supposed to have stabbed[] the victim; and that's it. That's all we've talked about." Slick did not demur to this as untrue. Nor did the court solicit a response to Moore's explanation. Whether Slick was referring to Avery's prior statement about the knife when he said what "would fly" is unknown. Because the trial judge failed to address this complaint when ruling on the motion, his factual findings are also unclear.

Moore also complained that not only was he left in the dark as to the proposed defense strategy, but also as to the theories behind the motions that were filed. When the court informed Moore that Slick had filed a motion to dismiss and a motion to suppress evidence, Moore clarified "I understand that. But I wanted him -- to discuss those motions with him and find out what was in the motions and what he's planning to argue." Moore added that he had a suppression theory of his own and, when discussing

it with Slick, Slick was reluctant to include it.

Slick confirmed that he and Moore had discussed Moore's additional theory for suppression and expressed to Moore his belief that the theory was not viable. Slick stated that he had nonetheless included the theory in the papers that were eventually filed. Slick, however, neither confirmed nor denied that he had failed to discuss the motion to dismiss that he had prepared. Nor did Slick deny refusing to discuss his own theories for the suppression motion. Again, the judge did not attempt to clarify this ambiguity nor did he address it when ruling on the motion.

The trial court never indicated what standard it was applying. Nor did it make any finding as to the amount or substance of the communication. Inasmuch as the state courts apparently find little cause for complaint over capital defense counsel whose "only significant interview with [the defendant] was at the courthouse on the morning of trial," People v. Mayfield, 5 Cal. 4th 142, 201, 19 Cal. Rptr. 2d 836 (1993), after having spent "only a total of 40 hours preparing for both the guilt and penalty phases of the trial," id., at 210 (Kennard, J., concurring and dissenting), it would be sheer speculation to assume that the trial court discredited Moore's factual allegations -- especially when they were not refuted by Slick.

Whatever his findings of fact were, the judge must have considered the amount of communication to be sufficient. Yet, this conclusion cannot be assessed -- even for an abuse of discretion -- absent an understanding of the underlying facts. It is not at all clear that the master calendar judge disbelieved

Moore's description of events. And, as described by Moore, the amount of communication was marginal at best. Even as described by Slick, however, this Court cannot make a definitive ruling. Slick did not deny Moore's description of the events. All Slick stated, in essence, was a formulaic conclusion that he believed the conferences were adequate and, to Moore's dismay, disappointingly candid as well.

Insofar as Moore is complaining about the "infrequency of his meetings with his attorney than about his reluctance to communicate with counsel," United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979), the record does not conclusively establish that this problem amounted to an "irreconcilable conflict" or "total lack of communication" of the sort that would require a change of counsel. It remains, however, a factor to be considered in reviewing Moore's other concerns.

2. Slick's Degree of Preparation

Moore identified several specific facts which led him to question Slick's preparation for trial. First, during his meeting with Slick on the day that Slick proposed declaring ready for trial, Slick apparently failed to recognize the name of a witness, James Jones, whom Moore had specifically asked Slick to interview. Second, during that same meeting, Slick allegedly displayed an inadequate familiarity with the specific facts of the case and the record, including documented inconsistencies in the anticipated testimony of the prosecution's key witness. Third, Moore believed that during the previous, long-term continuances, Slick did not have an opportunity to prepare for Moore's trial because he was busy representing other clients.

As to the dispute regarding witness Jones, the trial court's findings must have been consistent with the undisputed facts. Slick's initial unwillingness to interview Mr. Jones was not a basis for substitution of counsel because, by the time of the hearing, Slick had already committed himself to interviewing Mr. Jones.

The next aspect of Moore's complaint was that Slick was not sufficiently familiar with the witnesses and facts in his case. In the absence of any disagreement by Moore, the master calendar judge must have credited Slick's explanation that he had reviewed the record, compiled notes, and that Moore's discomfort arose from Slick's inability to respond to all the questions without referring to his notes. An attorney can be adequately prepared without having committed to memory every detail in the evidence.

The last aspect of Moore's concern over Slick's efforts was the ultimate question of whether Slick had actually expended substantial time preparing the case for trial. The trial court's explanation in denying the motion -- "Well, the Court is going to find, based on this record, that Mr. Slick has adequately prepared this case." -- obviously reflects an adoption of Slick's uncontroverted explanation as to his efforts. While the adequacy of Slick's preparation may be open to federal review, Sumner, 455 U.S. at 597, the trial court's underlying findings are undeniably factual in nature and, therefore, presumed correct unless proven otherwise. 28 U.S.C. § 2254(d). The trial court plainly concluded that Slick had in fact read and reviewed the transcripts, police reports, jail records, and had spent far more time preparing than Moore feared was the case. These conclusions

have fair support in the record. Moore gives no reason why the presumption of correctness does not attach to these findings.

Reviewing the record in the light most favorable to the party opposing summary judgment, the Court cannot find that the record conclusively demonstrates that Slick would have been inadequately prepared by the time trial was expected to commence. The master calendar court adopted Slick's explanations and had no discomfort with the absence of any intention on Slick's part to locate and interview Mr. Jones prior to trial. Cf. Walker, 915 F.2d at 483-85. Insofar as Slick's preparation is concerned, the face of the record does not establish that substitution of counsel was constitutionally required as a matter of law.

3. Moore's General Distrust

Probably the most significant problem with the relationship -- and the one most difficult to objectively quantify -- was Moore's general distrust of and discomfort with Slick. The tangible aspects of this complaint had two primary facets. First, irrespective of the trial judge's conclusion that Slick's investigative efforts were consistent with the constitutional minimum, Moore nonetheless had a strong personal belief -- which belief was not objectively unreasonable -- that Slick was not exerting his best efforts. Moreover, Slick's meetings with Moore were not sufficiently frequent or sufficiently detailed to put Moore's mind at ease. The second aspect arose out of Slick's having effectively abandoned Moore in the holding cell on March 5 and 9 after Moore expressed an interest in representing himself.

A defendant "justifiably expects that a lawyer will use every skill, expend every energy, and tap every legitimate

resource in the exercise of independent professional judgment on behalf of the client." Rewald, 889 F.2d at 858; accord Frazer, 18 F.3d at 785. As discussed in the preceding section, Slick's failure to have interviewed Mr. Jones earlier was not a basis for concluding that he would not be ready for trial. In light of Slick's apparently strong reluctance to interview Mr. Jones at all, however, Moore may have been justified in questioning Slick's dedication to Moore's defense.

While the trial court judge purported to concur in Slick's assessment of the futility in contacting Mr. Jones -- stating "common sense tells me that Mr. Jones isn't going to help you very much" -- he had no factual basis for doing so. The judge served in the master calendar department and nothing in the record indicates that he had any knowledge of the facts or witnesses in the case. Indeed, only moments before the instant colloquy, while attempting to impress upon Moore the benefits of representation by counsel, the judge confirmed he was only speaking in general terms because "I know nothing about this case. I'm not going to try this case." The only possible basis for the judge's conclusion was that Mr. Jones was going to be called as a witness by the prosecution. This, however, would prove to be an erroneous assumption.

As Moore recognized, Mr. Jones was a potentially important defense witness. Jones was the person who opened the security door to the building, allegedly enabling Avery, Harris, and Moore to enter the complex. Moore knew Jones. He also knew that Jones knew him and would have recognized him. Moore anticipated (correctly) that Jones would testify (as he had in the separate

trial of co-defendant Harris) that he, Jones, did not see Moore at the apartment complex on the night of the killings and that he would have recognized Moore if he had seen Moore. People v. Moore, 47 Cal. 3d 63, 83-84, 252 Cal. Rptr. 494 (1988), cert. denied, 490 U.S. 1095 (1989). Under these circumstances, it was entirely reasonable for Moore to want to have Slick meet with Jones and confirm the extent to which Jones could be used to prove that Moore was not present on the night of the murders.[10]

While the record suggests that Moore was expressing genuine concerns about Slick's efforts and while those concerns may have been objectively reasonable, when reviewed in the light most favorable to the party opposing summary judgment, the record does not conclusively establish that substitution of counsel was the only constitutionally permissible remedy.

The instances in which substitution of counsel will be constitutionally required based on the defendant's personal misgivings about counsel will be extremely rare. First, unlike defendants with monetary resources, "[t]he law does not permit [indigent defendants] to obtain the appointed counsel of [their] choice." United States v. Ono, 997 F.2d 647, 651 (9th Cir. 1993), cert. denied, 114 S.Ct. 738 (1994); compare United States

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[10] This particular complaint is similar to the situation presented in Walker, 915 F.2d 480. The Walker defendant complained that his attorney had failed to contact several witnesses who would have corroborated his claim of mistaken identity and who could have provided information suggesting that the defendant's roommate was the actual culprit. As in Walker, Moore's "lack of confidence in his attorney arose out of a disagreement over trial preparation and potential witnesses, rather than any general unreasonableness or manufactured discontent." Walker, 915 F.2d at 484. Contrary to the trial court's assertion, no matter whose interpretation is believed, Moore was justifiably concerned about having Jones interviewed.

v. Lillie, 989 F.2d 1054, 1055 (9th Cir. 1993). Second, indigent defendants cannot force the substitution of appointed counsel by unilaterally refusing to cooperate with their attorneys absent some cognizable or legitimate reason for doing so. Morris, 461 U.S. at 13.[11] Third, indigent defendants cannot manufacture a need for new counsel simply by failing to develop a "meaningful attorney-client relationship." Id.

To render substitution of counsel the only constitutionally permissible path, the attorney and client must have become embroiled in an irreconcilable conflict -- resulting in either a "personal conflict that affected his communication with counsel," Castro, 972 F.2d at 1110, some other "breakdown in communication" between the defendant and his lawyer, Roston, 986 F.2d at 1292, an impediment to the "present[ation of] an adequate defense," Walker, 915 F.2d at 485, or a "serious obstacle to effective representation," Ono, 997 F.2d at 651 -- which was not attributable to the defendant's petulance or lack of good faith.

A review of the many cases in which the Ninth Circuit and Supreme Court have passed on the severity of attorney-client disputes confirms that, while not ideal, Moore's relationship with Slick was not constitutionally intolerable. Cf. Morris, 461 U.S. at 13-14; Frazer, 18 F.3d at 783; Walker, 915 F.2d at 484.[12]

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[11] Accord United States v. Roston, 986 F.2d 1287, 1292-93 (9th Cir.), cert. denied, 114 S. Ct. 206 (1993); King, 977 F.2d at 1357; Hudson, 686 F.2d at 831. Cf. Frazer, 18 F.3d at 784.

[12] Here, unlike Walker, not only was the trial judge's inquiry more than adequate, but Moore did in fact have ongoing discussions with his attorney. Whether those conversations were "meaningful" -- i.e., more than idle pleasantries or vulgarities -- was not thoroughly analyzed by the trial judge, but was

(continued...)

Moore's motion for summary judgment on the claim that the master calendar judge violated Moore's constitutional rights when it refused to order a substitution of counsel is **DENIED**. Since the Court has neither asked for nor received briefing on what evidence outside the record exists or would be admissible, the Court does not enter a final order on the merits of this claim.

III. The Request for Co-Counsel Status

Moore's letter also requested that the master calendar judge "appoint me co-council (sic) with another lawyer." When the master calendar judge asked what Moore meant by "co-counsel," Moore explained that he wanted "to be in a position in order to, you know, ask the[] [the lawyers] about things and tell them, you know, make sure they do the things I ask them to do."

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12. (...continued)
inquired into at least briefly. The trial judge obviously determined that the discussions were sufficient and, while that conclusion is not irrefutably compelled by the record, neither is it incontrovertibly refuted. Whether treated as a finding of historical fact or a mixed question of fact in context of the legal rule to be applied, the trial judge's finding is not so attenuated that it can be set aside without an evidentiary hearing.

Similar to, but not as severe as, Walker, Moore had substantial reason to be concerned about Slick's preparation in light of Slick's failure to contact a relevant witness that Moore had previously identified to him. Similar to -- but nowhere near as severe as -- Frazer, Moore had to suffer through his attorney's imperious eruption and actual abandonment when Moore voiced a desire to assert his constitutional rights. Slick's desertion of Moore in the holding cell -- twice -- was surely sufficient to dislodge whatever trust that had been cultivated.

Nonetheless, despite the existence of these legitimate disputes, even accepting that Moore neither trusted nor had faith in Slick, the record does not conclusively establish that these conflicts effected a total breakdown in his communication with Slick. The record does not establish that Moore was unable to communicate with Slick regarding significant, case-related matters. Cf. Walker, 915 F.2d at 484. Nor does the record establish "that the alleged conflict was so great that it prevented [Moore] from presenting an adequate defense." Id., McClendon, 782 F.2d at 789.

Although a hearing on the self-representation motion had already been postponed until the following Monday, the court responded that it appeared that Moore was asking for "stand-by" counsel and that such assistance was not necessary "because you are not pro per, you see?" When Moore confirmed that he wanted permission to proceed pro se, the court reaffirmed that the pro se request would not be considered until a later date.

A. Cognizability

Respondent's cognizability argument is premised on the assumption that Moore does not have a federal constitutional right to serve as co-counsel. Since no federal rights were violated, the argument continues, his claim must be based on an alleged violation of state law which, of course, is not cognizable on federal habeas. E.g. Estelle v. McGuire, 502 U.S. 62, 67 (1991); cf. Hicks v. Oklahoma, 447 U.S. 343 (1980).

The defect in the argument -- besides being tautological -- is that it erroneously equates a failure on the merits with a lack of jurisdiction. Bell v. Hood, 327 U.S. 678, 682 (1946). Moore asserts that he has a right, guaranteed by the federal constitution, to serve as co-counsel and that this federal right was infringed by the state courts. Whether the state court's rulings in fact violated the federal constitution, as Moore argues, is an appropriate inquiry on federal habeas review.

B. Teague Retroactivity

The Attorney General next argues that the claim must be denied because, to vindicate these asserted constitutional rights, would amount to creating a new rule of constitutional criminal procedure during federal habeas review. The bane of

this argument is that it is necessary to review the underlying merits in order to determine whether there was in fact such a constitutional right in existence.[13]

1. Refusal to Permit Hybrid Representation

Notwithstanding Moore's clear request for co-counsel status -- i.e., to be represented by counsel but in a position to exercise control over the lawyer's efforts -- the master calendar judge treated the motion as one seeking appointment of advisory counsel. The Ninth Circuit has noted a distinction between "co-counsel" and "stand-by," or "advisory," counsel. Distinguishing between the forms of representation, the circuit observed:

> [C]o-counsel and advisory counsel are terms that have gained distinct meanings. Advisory counsel is generally used to describe the situation when a pro se defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial. In the co-counsel situation, the attorney may participate directly in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.).

Locks v. Sumner, 703 F.2d 403, 407 (9th Cir.), cert. denied, 464 U.S. 933 (1983).

Although drawing a distinction between the forms, the circuit refused to recognize a difference in their constitutional stature. The circuit has ruled that neither type rises to the level of constitutional importance. See United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) (no right to co-counsel status); Locks, 703 F.2d at 408 (no right to advisory counsel).

2. Application of Retroactivity Doctrine

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[13] Moore does not contend that he had any state law right, which would have been protected by the due process clause, to either co-counsel status or to appointment of stand-by counsel. Cf. Hicks, 447 U.S. 343.

Under Teague, a federal court may not announce or enforce "new rules of constitutional criminal procedure" during habeas proceedings. Teague, 489 U.S. at 310. Under Halbert, Moore had no constitutional right to co-counsel status. Moore fails to explain why faulting the trial court for having denied him co-counsel status would not amount to creating a new rule of constitutional criminal procedure within the meaning of Teague.

Similarly, under Locks, Moore had no federal right to advisory counsel either. Moore is correct that the master calendar judge erred in denying stand-by counsel on the basis that Moore was not pro se after having expressly postponed a hearing on the pro se request. Nonetheless, Moore cannot complain of the error since he has no right to stand-by counsel. As such, vindication of this claim would require the habeas court to fashion a "new rule of constitutional criminal procedure" in contravention of Teague.

IV. Denial of Motion for Second Counsel

Moore does not argue that the federal constitution independently guarantees him a right to be represented by two attorneys. Rather, he asserts that the State extended this right to him and the due process clause prohibits the State from arbitrarily taking it away.

Approximately two years before the events at issue, in Keenan v. Superior Court, 31 Cal. 3d 424, 180 Cal. Rptr. 489, appeal dismissed, 459 U.S. 937 (1982), the California Supreme Court decided that a series of California statutes entitled capitally-charged defendants to representation by more than one attorney if the circumstances so required:

> [Trial courts have] ample authority for appointment of an additional attorney shown to be necessary for defense of a capital case. . . . The appointment is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court. . . . That discretion, of course, must be guided by legal principles and policies appropriate to the particular matter at issue.

Keenan, 31 Cal. 3d at 430.

Two years later, in this case, during the canvass on Moore's satisfaction with Slick, Moore requested appointment of a second attorney. The trial court, however, rejected this out of hand:

> THE DEFENDANT: Okay. And I was informed, too, that because of the fact that I have a special circumstances (sic), that I could have two representatives represent me in this case. Is that correct?
>
> THE COURT: No, I never heard of that. I never heard of that. Two representatives? You mean two lawyers?

Moore retraced his steps somewhat and said he would be satisfied with any two representatives, including himself serving as co-counsel. On direct appeal, the California Supreme Court ruled that the trial court carefully considered the request and "exercised proper discretion in denying defendant's Keenan motion." Moore, 47 Cal.3d at 76.

A. The Claim is Cognizable on Federal Habeas

What the Attorney General fails to recognize in its cognizability argument is that Moore is not seeking purely a vindication of state law. Cf. Estelle, 502 U.S. at 67. Rather, Moore here claims that he has a due process interest in the State's extension of the procedural guarantees that it accords to all its other capital defendants.

The Ninth Circuit and Supreme Court have both recognized that while the states may not be impelled to adopt any particular

mode of procedure, "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993), cert. denied, 115 S. Ct. 290 (1994).[14] Given the obvious importance of "the guiding hand of counsel" as "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty," Powell v. Alabama, 287 U.S. 45, 69 (1932), Johnson v. Zerbst, 304 U.S. 458, 462 (1938) -- and especially the heightened importance of counsel in capital cases -- California's statutory guarantee of a provisional right to second counsel in capital cases is precisely the type of procedural right that is protected from arbitrary deprivation by the due process clause. The Attorney General has failed to suggest any reason why the Court should conclude otherwise. The claim is, therefore, cognizable on federal habeas. Fetterly, 997 F.2d at 1300, Campbell, 997 F.2d at 522.

B. The Trial Court Arbitrarily Deprived Moore of His Qualified Right to Assistance of Second Counsel

As noted above, in response to Moore's request for second counsel, the master calendar judge unambiguously rejected the possibility of appointing second counsel as unsupported by any legal authority. The judge did not consider any of the "legal

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[14] As explained by another recent Ninth Circuit panel, "Hicks [v. Oklahoma, 447 U.S. 343 (1980)] recognized that state laws which guarantee a criminal defendant procedural rights . . . , even if not themselves constitutionally required, may give rise to liberty interests protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause." Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1992), cert. denied, 114 S.Ct. 1337 (1994).

principles and policies appropriate to the particular matter at issue." Keenan, 31 Cal. 3d at 430. The judge did not exercise any discretion; rather, the court simply rejected the claim as unprecedented: "No, I never heard of that."

As pithily characterized by Justice O'Connor, "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." Schlup v. Delo, 115 S. Ct. 851, ___ (1995) (O'Connor, J., concurring). This is not, of course, simply the view of a single justice, but rather reflective of a long tradition in the common law. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).[15]

C. In the Unique Circumstances of this Case, the Trial Court's Error was Harmless

Even though the master calendar judge abruptly terminated any discussion on the need for additional counsel by summarily concluding that the request was without legal authority, because Moore also had other motions on calendar relating to counsel's performance, the record adequately documents the basis for Moore's request for additional counsel. Because these reasons were insufficient to justify appointment of second counsel, this Court can confidently conclude that, irrespective of the master calendar judge's unfamiliarity with the authority provided by Keenan, second counsel would not have been authorized.

In describing the contours of the authority for appointing second counsel, the state supreme court in Keenan noted several

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15. Accord Campbell, 997 F.2d at 516 ("A court abuses its discretion when it bases its decision on an erroneous legal conclusion."), Petition of Hill, 775 F.2d 1037, 1040 (9th Cir. 1985) ("There is an abuse of discretion when a judge's decision is based on an erroneous conclusion of law.").

factors that would always weigh heavily in considering a request for additional counsel, including the need, heightened in a capital case, "to provide a complete and full defense" coupled with the "importance . . . [of] pretrial preparation in providing a criminal defendant effective legal assistance." Id. at 431. While vesting the trial courts with discretion to rule on individual requests, the state supreme court explained:

> If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required.

Keenan, 31 Cal. 3d at 434. The specific facts of Keenan are significant. While the capital nature of the case was an undoubtedly significant factor, Keenan, 31 Cal. 3d at 430-32, the court has stood firm that a defendant must still identify some "important assistance" or "genuine need" before additional counsel would be authorized. E.g. People v. Lucky, 45 Cal. 3d 259, 279, 247 Cal. Rptr. 1 (1988), cert. denied, 488 U.S. 1034 (1989).[16]

While Moore cannot be criticized for having failed to present the "factual and specific need" in the context of his request for second counsel -- as any discussion was effectively terminated by the master calendar court -- Moore was able to present his reasons therefor during the hearing on his request

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16. Accord People v. Burgener, 41 Cal. 3d 505, 524, 224 Cal. Rptr. 112 (1986); People v. Jackson, 28 Cal. 3d 264, 168 Cal. Rptr. 603 (1980), cert. denied, 450 U.S. 1035 (1981); People v. Wright, 52 Cal. 3d 367, 410, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834 (1991).

for a change of counsel. Unlike Keenan, Moore did not present any sound basis for the trial court to approve second counsel. Although Moore identified several aspects of trial counsel's performance that he believed should have been more thorough, none of the alleged failings was due to the absence of an attorney to assist Slick. Rather, the deficiencies alleged were simply criticisms of Slick's ideas as to how to prepare for trial.[17]

V. The Pre-Trial Motion to Discharge Slick and Proceed Pro Se

A. Overview of the Underlying Constitutional Right

On the following Monday, March 19, the final pre-trial counsel-related matter -- Moore's motion to discharge Slick and proceed pro se -- was taken up in the master calendar department in front of the same judge who had presided over all the prior Superior Court hearings in this case.

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court affirmed that the Sixth Amendment guaranteed not only a right to proceed with counsel, but also "a constitutional right to proceed without counsel when [the defendant] voluntarily and intelligently elects to do so." Id. at 807 (emphasis original). Few rights, however, are absolute. While the Court was firm that defendants had a right of self-representation, it provided little

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[17] It should be emphasized that the harmlessness conclusion is not premised on a finding that a second attorney could not have meaningfully contributed to the defense efforts or that the trial court "could have" properly exercised its discretion to deny the motion. Those analytic approaches would be inconsistent with the very nature of the error involved -- the trial court's failure to exercise any discretion at all, thereby arriving at an arbitrary result. Rather, the Court's conclusion of harmlessness rests on the finding that, at the hearing on the motion to substitute counsel, Moore was unable to establish the prerequisites upon which the second counsel was conditioned.

guidance as to how that right would be implemented. Since self-representation necessarily meant proceeding without a lawyer and, therefore, surrendering "many of the traditional benefits associated with the right to counsel," the Court noted that "the accused must 'knowingly and intelligently' forgo those relinquished benefits." Faretta, 422 U.S. at 835.[18]

In the years since Faretta, the courts have had the opportunity to refine the parameters within which the self-representation right may be invoked. Most recently, the Ninth Circuit listed four principal conditions that must be satisfied: "In order to invoke the right of self-representation, the request must be (1) knowing and intelligent, (2) unequivocal, (3) timely, and (4) not for purposes of delay." Peters v. Gunn, 33 F.3d 1190, 1192 (9th Cir. 1994); accord Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986); United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994).

There is no dispute but that Moore was prepared to make a knowing and intelligent waiver of his right to counsel and the benefits related to assistance of counsel. Nor can it be argued that Moore equivocated on his request.[19] Instead, the trial

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[18] The Court refused to impose minimum qualifications for serving as one's own lawyer, but stated that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." Id. "[H]is technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself." Id. at 836.

[19] Moore's letters to the court, his completion of the formal petition to proceed in pro per, along with his numerous statements of genuine dissatisfaction with Slick's performance in particular and his general distrust of most attorneys would clearly refute any contention that Moore's request was not

(continued...)

court and state supreme court here found that the request was untimely. The state supreme court further implied that the trial court found that the motion was made for purposes of delay. The Attorney General primarily defends the judgment based on these two contentions.

B. Moore's Motion Was Timely as a Matter of Law[20]

1. Ninth Circuit Precedent Establishes that Moore's Motion was Timely as a Matter of Law

The Ninth Circuit rule is clear. As frequently reiterated:

> The constitutional right of self-representation, recognized in Faretta v. California, must be timely asserted. "A defendant must [however] have a last clear chance to assert his constitutional right . . . before meaningful trial proceedings have commenced." Thus, a motion to proceed pro se is timely if made before the jury is empaneled.

Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982) (brackets and ellipses original, citations omitted) (quoting Chapman v. United States, 553 F.2d 886, 895 (5th Cir. 1977)).

This is the standard universally applied in the Ninth Circuit, both to state habeas cases as well as to cases on direct appeal from federal trials. United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (direct appeal); Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U.S. 976 (1982)

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19. (...continued) sufficiently definite. Armant, 772 F.2d at 555; Adams v. Carroll, 875 F.2d 1441, 1444-45 (9th Cir. 1989).

20. Teague's retroactivity analysis is no bar here since, as explained below, under any of the standards employed in the various courts, Moore's motion was timely. The only standard under which Moore's motion would not have been timely is a rule employed by only two isolated state courts. The Court finds that this minority approach is "objectively unreasonable." Stringer, 503 U.S. at ___, 112 S. Ct. at 1140.

(state habeas).[21] Under this standard, Moore's motion -- no matter when it was "deemed made" -- was timely as a matter of law since the jury was not empaneled prior thereto.[22] Not insignificantly, on both March 19 when the matter was heard in the master calendar department and on March 22 when the first relevant hearing was held in the trial department, the trial court judges were both well aware that the trial was not going to start that very day. Both knew that Slick had filed pre-trial motions -- including one that would require testimony from out-of-state witnesses -- that would prevent the actual trial from starting on the designated day.[23]

Nevertheless, the Attorney General argues that this Court should depart from the law of the Ninth Circuit. He argues that the timeliness of a self-representation motion is a question of state, not federal, law and, therefore, Moore's untimeliness was a state procedural default which bars review in this court.

The simple answer to the Attorney General's argument is, of course, that the Ninth Circuit has already on several occasions

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21. Accord Armant, 772 F.2d at 555 (same); United States v. Smith, 780 F.2d 810, 811-12 (9th Cir. 1986); Savage, 924 F.2d at 1463 n.7 (state habeas); Arlt, 41 F.3d at 519 (direct appeal).

22. Similarly, Moore's motion directly to the trial judge -- which, instead of being treated as a motion to dismiss, was treated as a renewal of the motion for self-representation -- was also timely as a matter of law. Contrary to the reasoning that the reviewing court used in relation to the master calendar court's rulings, when the trial judge denied the self-representation motion he expressly acknowledged on the record that there was no likelihood that the jury would be empaneled within the following 6 days. (IA R.T. A-163:7-18.)

23. The California Supreme Court's finding to the contrary, Moore, 47 Cal.3d at 81, is clearly refuted by the undisputed record. (IA R.T. 1:22-28, 17:21-25, A-163:7-18.)

applied the federal standard to state habeas cases. Maxwell, 673 F.2d at 1036; Fritz, 682 F.2d at 784; Armant, 772 F.2d at 555; Savage, 924 F.2d at 1463 at n.7. This Court is bound by the precedent of the Ninth Circuit and, therefore, must follow those cases applying the federal timeliness standard to state cases.[24]

2. The Standard for Adjudging the Timeliness of a Motion for Self-representation is a Matter of Federal Significance Properly Governed by Federal Law

Notwithstanding the Ninth Circuit's clear instructions, the Attorney General argues that the timeliness of a motion for self-representation is purely a question of state procedural law, properly relegated to the state courts and immune from federal review. This is incorrect for two reasons. First, there is a substantial federal interest in ensuring that the Faretta right

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[24] As the Ninth Circuit has previously explained in the context of differing implementations of the rights confirmed by Faretta:

> Federal courts must apply federal constitutional law in cases properly before them under the federal habeas statute. It is thus the district court's duty to apply the law of the appropriate circuit to all persons presenting claims within its jurisdiction. State interpretations of the federal constitution and laws are persuasive authority, but a district court may consider them on federal questions only if the question is otherwise open.

Bittaker v. Enomoto, 587 F.2d 400, 402 n.1 (9th Cir. 1978) (citation omitted), cert. denied, 441 U.S. 913 (1979).

Here, the question is not "otherwise open." The issue has been resolved in prior Ninth Circuit cases. The "jury empanelment" rule for timeliness has clearly been held applicable to state habeas review. Armant, 772 F.2d at 555 (citing Fritz, 682 F.2d at 784, and Maxwell, 673 F.2d at 1036); Savage, 924 F.2d at 1463 n.7. The Attorney General's argument that the Ninth Circuit has allegedly "improperly overstepped its authority in doing so" is properly presented to the circuit sitting en banc or the United States Supreme Court, Nichols v. McCormick, 929 F.2d 507, 510 (9th Cir. 1991), cert. denied, 502 U.S. 1115 (1992), not to this district court. Bittaker, 587 F.2d at 402 n.1.

is not circumvented by the erection of state procedural barriers that make invocation of the right a practical impossibility. Second, the state law relied upon by the Attorney General confirms that the California courts are fully in accord with the view that the timeliness of a self-representation motion is a federal question, not a matter of state procedure.

a. The Federal Courts have Treated Timeliness as a Matter Infused with a Federal Interest

The Supreme Court did not propose standards for gauging the timeliness of a self-representation motion in Faretta because, in that case, the first request for self-representation was made "weeks before trial." Faretta, 422 U.S. at 835. While the States might be granted some leeway in establishing timeliness standards for self-representation motions, it should be beyond dispute, especially in light of the very facts of Faretta itself, that the State could not constitutionally establish the initial detention hearing or arraignment as the cut-off date by which a request for self-representation must either be asserted or forever waived. Yet, in Moore's case, the state supreme court announced a standard which, in practice, would have precisely that effect.

In rejecting Moore's arguments on appeal, the state supreme court did not simply conclude that the self-representation motion, deemed to have been made on the Friday preceding a Monday trial date, was properly denied because it was made on a date that trial could have begun. Moore, 47 Cal. 3d at 79. Nor did it simply fail to consider valid the explanation tendered for the timing of the pro se request; the state court went further to hold, in the alternative, that the request would have been

untimely even if deemed to have been made on March 5 -- nearly a month before the jury was eventually empaneled on March 29. Moore, 47 Cal. 3d at 80.

Because the state court appears to perceive that any self-representation request that could require a continuance would be per se untimely, it has come perilously close to declaring that the right to represent oneself (especially in non-capital cases), while frequently available as a matter of theory, is virtually never available in reality. The rule applied by the state court appears to be in direct conflict with Faretta itself.

In adopting jury empanelment as the point when the self-representation ceases to exist as an entitlement and, rather, becomes subject to the trial court's discretion, the Ninth Circuit adopted the Fifth Circuit's analysis in Chapman v. United States, 553 F.2d 886. Maxwell, 673 F.2d at 1036; see also Fritz, 682 F.2d at 784. It is noteworthy that Chapman itself also acknowledged that the Ninth Circuit had previously used, without expressly adopting, jury empanelment as the critical point for determining timeliness. Chapman, 553 F.2d at 894 (citing Price, 474 F.2d at 1227). The Fifth Circuit also noted that jury empanelment was the crucial stage relied upon by the Second and District of Columbia Circuits as well. Beyond simply counting cases, however, the Fifth Circuit went on to explain:

> If there is to be a Rubicon beyond which the defendant has lost his unqualified right to defend pro se, it makes far better sense to locate it at the beginning of defendant's trial, when the jury is empaneled and sworn, than when defense counsel announces "ready." First, the declaration of "ready" at a calendar call bears no functional relation to the pro se right or to the actual beginning of trial; there may be many cases on a court's docket, and delays as long as the eleven days in this case [between 13 and 24 days

> in Moore's case] between "ready" and trial are not uncommon. Second, a defendant may not appear at calendar call, and his first opportunity directly to address the court regarding his counsel may be the day of his trial. Third, the defendant may acquire disconcerting information about the substance or manner of his counsel's planned defense only once counsel begins the voir dire. Fourth, the expense of any delay rises dramatically once the jury is empaneled. Finally, a mid-trial change to a pro se defense may be thought to disrupt the continuity of ongoing proceedings, a danger not present when the defendant asserts his right to defend himself before the jury is sworn.

Chapman, 553 F.2d at 894.[25]

The standard for adjudging the timeliness of a motion for self-representation is thoroughly infused with federal concern over a proper implementation of the constitutional right of self-representation.[26] In the words of the Ninth Circuit and Supreme

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[25] In Chapman, the Fifth Circuit noted that "Chapman's counsel announced that he was "ready" while knowing that Chapman wished to discharge him, that Chapman wished to represent himself, and that no one had yet informed the judge of a choice Chapman had already announced to his counsel." Chapman, 553 F.2d at 894-95. So too here, Slick announced "ready" -- whether on March 5, 9, or 16 -- "while knowing that [Moore] wished to discharge [Slick], that [Moore] wished to represent himself, and [as of the hearings on March 5 and March 9] that no one had yet informed the judge" of Moore's request.

Again, in this case as in Chapman, "the judge postponed until [later] consideration of [the defendant's] request to discharge his counsel while at the same time accepting counsel's declaration of 'ready.'" Chapman, 553 F.2d at 895. As explained by the Fifth Circuit,

> To allow [a defendant's] right to defend pro se to be foreclosed merely by his counsel's declaration of ready would be fundamentally unfair when, as here, [the defendant] no longer wanted his attorney to represent him. One can hardly say that the defense is "ready" if a defendant has already parted ways with his appointed counsel.

Chapman, 553 F.2d at 895.

[26] The First Circuit has noted that using jury empanelment as the marker for timeliness is consistent with the fact that this is the point when jeopardy attaches to the prosecution. United States v. Betancourt-Arretuche, 933 F.2d 89, 96 (1st Cir.), cert. denied, 502 U.S. 959 (1991).

Court, "the federal rule is an integral part of the constitutional guarantee." Locks, 703 F.2d at 406 (quoting Crist v. Best, 437 U.S. 28, 32 (1978)). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). Even if the Ninth Circuit had not, on numerous occasions, applied the federal timeliness standard on state habeas review, the question of timeliness would properly be analyzed by this Court under federal constitutional standards.

b. California's Rules Regarding the Timeliness of Self-Representation Motions are Based on Federal Law

Moreover, however, the state court's own analysis of the timeliness inquiry confirms that it was based on an analysis of the federal guaranty and not an attempt to impose a state procedural hurdle in the way of prospective pro se criminal defendants. The state supreme court herein expressly rested its holding upon its prior decision in People v. Windham, 19 Cal. 3d 121, 137 Cal. Rptr. 8, cert. denied, 434 U.S. 848 (1977). Moore, 47 Cal.3d at 79.

Windham, in turn, was clearly concerned with interpreting and applying the federal constitutional guaranty. Before setting forth the rule to be followed in California, the state court reviewed the cases decided in other state and federal courts, Windham, 19 Cal. 3d at 126-27, and concluded that self-representation motions made "within a reasonable time prior to the commencement of trial" invoked a "constitutionally mandated

unconditional right" whereas self-representation motions made mid-trial raised no constitutional concerns. Id. at 128-29 & 129 n.6.

The trial court's ruling herein was similarly based on an understanding of the federal constitutional guaranty and not on a separate or independent rule of state procedure. The trial court specifically cited the state court of appeal decision in People v. Ruiz, 142 Cal. App. 3d 780, 191 Cal. Rptr. 249 (1983), as the basis for its ruling on timeliness. Ruiz, to no surprise, was based explicitly on Windham. Further, Ruiz expressly acknowledged that the federal courts had interpreted the timeliness standard differently, but explained that it was obligated to follow the timeliness interpretation of the state supreme court. Ruiz, 142 Cal. App. 3d at 788 n.3 (citing Fritz, 682 F.2d at 784, and Chapman, 553 F.2d at 894-95).

3. Moore's Motion for Self-Representation was Timely Under Any Standard

Ultimately, however, the Attorney General's argument is unavailing because, under the standards enforced in virtually every jurisdiction in the country, including the standard putatively applied by the state supreme court in Moore, based on the record currently before the Court, Moore's motion was timely as a matter of law.

Moore's motion was per se timely under the standard employed by the District of Columbia, First, Second, Fifth and Eighth Circuits as those circuits have adopted the same timeliness test

as is used by the Ninth Circuit.[27] So too would the motion have been per se timely under the standards used by the Fourth, Sixth, and Seventh Circuits. These latter three circuits have declared that self-representation motions are timely if made before "meaningful trial proceedings" have commenced, usually defined as the empanelment of the jury but with a willingness to closely scrutinize the request once jury selection has started.[28]

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[27] United States v. Dougherty, 473 F.2d 1113, 1124 (D.C.Cir. 1972); Betancourt-Arretuche, 933 F.2d at 96; United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966); Chapman, 553 F.2d at 894-95; United States v. Wesley, 798 F.2d 1155, 1155-56 (8th Cir. 1986) (adopting Second Circuit standard); Fritz, 682 F.2d at 784; Horton v. Dugger, 895 F.2d 714, 715, 717 (11th Cir. 1990) (jury actually sworn, but noting in dicta that jury selection may be crucial event).

A significant number of state courts have adopted this test for timeliness. Barnes v. State, 258 Ark. 565, 570-71, 528 S.W.2d 370 (1975); State v. Cornell, 179 Ariz. 314, 878 P.2d 1352, 1364 (1994); Commonwealth v. Miller, 6 Mass. App. Ct. 959, 960, 383 N.E.2d 1144 (1978) (adopting D.C. and Second Circuit standards); People v. McIntyre, 36 N.Y.2d 10, 17-18, 364 N.Y.S.2d 837, 324 N.E.2d 322 (1974); Ex Parte Winton, 837 S.W.2d 134, 135 (Tex. Crim. App. 1992) (citing Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984)); Stockton v. Commonwealth, 241 Va. 192, 202-03, 402 S.E.2d 196, 201-02 (dilatory purpose is separate basis for denial), cert. denied, 502 U.S. 902 (1991).

[28] United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979), cert. denied, 444 U.S. 1084 (1980); Robards v. Rees, 789 F.2d 379, 383-84 (6th Cir. 1986); United States v. Oakey, 853 F.2d 551, 553 (7th Cir. 1988), cert. denied, 488 U.S. 1033 (1989); United States v. Jones, 938 F.2d 737, 743 (7th Cir. 1991). Cf. Horton, 895 F.2d at 715, 717.

Several states have adopted this pre-"jury empanelment" test. State v. Cromwell, 253 Kan. 495, 505-06, 856 P.2d 1299, 1307 (1993) (prior to trial, assertion of right must be honored; mid-trial motion is untimely); State v. Nix, 327 So.2d 301, 354 (La. 1975) (motion made after jury selection is untimely), cert. denied, 425 U.S. 954 (1976); Estelle v. State, 558 So.2d 843, 847 (Miss. 1990) (mid-trial request is untimely).

Citing United States v. Merchant, 992 F.2d 1091, 1095 (10th Cir. 1993), the Attorney General incorrectly groups the Tenth Circuit as being among the circuits that have departed from the jury empanelment approach. Merchant did not involve invocation of the right to proceed pro se. Rather, it involved an attempt (continued...)

So too would Moore's motion been found timely under the test used in the only remaining circuit, the Third, which does not consider timeliness to be an independent factor in determining whether to permit self-representation. Rather, it has simply focused on whether the motion was made in good faith and not interposed as a tactic to secure unjustifiable delay.[29]

Although not employed by any of the federal courts, a handful of States have adopted a standard similar to the one announced by California in Windham, 19 Cal. 3d 121, and purportedly applied by the state supreme court in Moore, 47 Cal. 3d at 79.[30] Under this standard too, however, it would have been

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[28] (...continued)
at mid-trial withdrawal of pro se status with a concurrent re-invocation of the right to counsel. The Tenth Circuit there held that the request for counsel was unduly delayed and, therefore, properly denied since the government had proceeded through two-thirds of its case. The question at issue in Merchant was very different from the question at issue here -- the time by which defendants must assert their right to proceed pro se. No other Tenth Circuit case appears to have resolved the question at issue herein. Further, as a case involving a mid-trial request, it can hardly be said that the Tenth Circuit in Merchant rejected the majority approach adhered to by the Ninth Circuit.

[29] Government of Virgin Islands v. James, 934 F.2d 468, 470 (3d Cir. 1991); United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982). While the Third Circuit uses a different analytical framework, its analysis is not inconsistent with the Ninth Circuit's. For, in determining whether a self-representation motion must be granted, the Ninth Circuit has added as a separate element, beyond pure "timeliness," that a self-representation motion need not be granted if interposed for purposes of delay. Adams, 875 F.2d at 1442; Fritz, 682 F.2d at 785. This test has also been adopted by two state courts. Snead v. State, 286 Md. 122, 132, 406 A.2d 98, 103 (1979); People v. Dennany, 445 Mich. 412, 432 n.12, 519 N.W.2d 128, 136 n.12 (1994); Hamiel v. State, 92 Wis. 2d 656, 285 N.W.2d 639, 649 (1979).

[30] People v. Mogul, 812 P.2d 705, 708 (Colo. 1991); Lyons v. State, 106 Nev. 438, 445-46, 796 P.2d 210, 214-15 (1990); Matter of Richardson, 100 Wash.2d 669, 674-75, 675 P.2d 209 (1983) (citing State v. Fritz, 21 Wash.App. 354, 360-61, 585 P.2d 173 (continued...)

error to deny Moore's motion as untimely.

In Windham, the California Supreme Court held that a motion to proceed pro se would be timely if asserted "within a reasonable time prior to the commencement of trial." Id., 19 Cal. 3d at 128. In addition, the court remarked that motions interposed at a later time should also be deemed timely if conjoined with "some showing of reasonable cause for the lateness of the request." Id. at 128 n.5. The Windham court expressly cautioned, however:

> Our imposition of a "reasonable time" requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the Faretta mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.

Id. (emphasis original).

Thus, the court explained:

> When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly process of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by reasonable standards.

Id.

Although the state supreme court herein purported to apply the Windham standard, the only inquiry it undertook was whether the motion was made in close proximity to trial. But Windham

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30. (...continued)
(1978) (adopting Windham standard)); Williams v. State, 655 P.2d 273, 276-77 (Wyo. 1982); State v. Sandler, 175 W.Va. 572, 574 n.2, 336 S.E.2d 535 (1985) (motion on day of trial not timely, but subject to exercise of discretion in light of circumstances of the case, citing State v. Sheppard, 172 W.Va. 656, 310 S.E.2d 173, 189-90 (W.Va. 1983)).

required more. No different than the Ninth Circuit's analysis in Fritz, Windham acknowledged that there are often "situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." Windham, 19 Cal. 3d at 125 n.5.

The record before this Court -- uncontested by Respondent -- plainly demonstrates that Moore had more than adequately justified the timing of his request.[31] The master calendar judge did not question Moore's description of the timing of events. Nor did the California Supreme Court.[32] In light of the

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31. While the state supreme court found that Moore's motion was not "made" until Friday March 16, when the hearing was eventually held, this finding -- if considered "factual" and therefore within the scope of § 2254(d)'s presumption of correctness -- is plainly contradicted by the record. 28 U.S.C. § 2254(d)(8).

The state court reasoned that "what defendant was requesting with regard to counsel . . . [was] not readily apparent from the letter." Moore, 47 Cal.3d at 79. It found, therefore, that "the date of the hearing, when the court was able to elicit from defendant his concerns, [is the date] that we must treat as the date of defendant's Faretta motion." Id.

This analysis is in plain conflict with the undisputed record. Moore's letter to the court was in no way ambiguous as to his intention to seek permission to proceed pro se. At the conclusion of his letter, Moore asked for two specific forms of relief, the first was to be permitted to attend all future court hearings, and the second was, in Moore's own words:

> 2) I ask that the court appoint me co-council (sic) with another lawyer or allow me to go pro-per, which is my constitutional right "of self-represention" (sic) under the Sixth Amendment. Farett (sic) v. Calif., 422 U.S.

Insofar as is relevant to applying the "reasonable time before trial" standard, the state court's finding regarding the date of the motion is clearly rebutted by the record. "Convincing evidence" -- i.e., the undisputed record -- clearly establishes "that the factual determination by the state court was erroneous." 28 U.S.C. § 2254(d). (Under the governing Ninth Circuit standard, of course, this finding is of no consequence.)

32. In rejecting Moore's explanations without seriously considering the reasons for the timing of Moore's request, the (continued...)

procedural posture of this case, this Court need not question the accuracy of the statements contained in Moore's letter. Since the Attorney General does not seek to supplement the record in this regard, for purposes of summary judgment, the Court finds that Moore's reasons for the timing of his motion were those expressed in his letter.[33] Those reasons more than adequately justified the timing of the self-representation motion.[34]

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[32] (...continued)
state court steered a course very similar to the one taken by Kentucky and Indiana -- both of which consider only the proximity of the trial date and disregard any reasons for the timing of the request. Moore v. Commonwealth, 634 S.W.2d 426, 430-31 (Ky. 1982); Smith v. State, 474 N.E.2d 973, 979 (Ind. 1985). These are the only two jurisdictions in the nation -- with California arguably joining as a third in light of the functional analysis applied in Moore -- to employ such a stringent approach to the timeliness of a self-representation motion.

[33] In light of the master calendar judge's acceptance of Moore's description of the pre-letter events and the state supreme court's finding that the trial court was "well aware of defendant's stated reasons," these facts might even be entitled to the statutory presumption of correctness. 28 U.S.C. § 2254(d).

[34] Moore's initial complaint focused on Slick's preparation for trial and refusal to interview Mr. Jones. Whether Moore was correct in his assessment of Slick's readiness is not relevant. Equally irrelevant is whether the trial court agreed. "It's the client's comfort, not the judge's, that the Sixth Amendment protects." Lillie, 989 F.2d at 1056. Thus, the critical facts were that Slick's efforts were unsatisfactory to Moore, that Moore's criticisms were not spurious, and that these were bona fide expressions of discomfort, not simply manufactured disputes designed to impede the judicial process.

Moore could not reasonably be expected to complain of Slick's trial preparation until that preparation was substantially complete. Indeed, at the previous status conferences Slick himself acknowledged that his investigation was not yet complete. Any earlier criticism of trial counsel's preparation efforts would have been premature.

Once it is clear that the dispute did not arise until March 5, it is also clear that Moore did not unduly delay presentation of his request to proceed pro se. The March 5 confrontation between Moore and Slick occurred shortly before a status conference in the master calendar court. Slick abandoned Moore in the holding cell outside the courtroom. While concurring in a

(continued...)

In light of the compelling justification for the timing of Moore's motion and the clear fact that it was presented at Moore's first opportunity to do so, the state court never

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[34] (...continued)
four-day continuance to accommodate the prosecutor, Slick did not mention Moore's dissatisfaction with Slick's own preparation. Moore was not present at that hearing to express his desire to proceed pro se.

The events at the hearing, in fact, reinforce the reasonableness of the self-representation motion's timing. While Moore's pro se request was conditioned on the trial court's refusal to remove Slick and refusal to grant Moore co-counsel status, Moore's desire to excuse Slick entirely was strongly fortified when Slick went to the March 5 hearing -- knowing that Moore disagreed with Slick's state of readiness and knowing that Moore desired to request co-counsel or pro se status -- and left Moore in the holding cell outside the courtroom and conveyed to the court none of Moore's concerns. Prior to the March 5 meeting, Moore was primarily interested in co-counsel status. After being upbraided by Slick and then excluded from two hearings, however, Moore concluded that his primary objective should be to have Slick entirely removed from the case or at least subordinated to someone else. Moore's sense of betrayal -- whether reasonable or not -- could not have been expressed to the court prior to these events actually having taken place.

According to Moore's letter, after the March 5 hearing, Slick informed him that the case had been trailed until Friday March 9. It was entirely reasonable for Moore to expect to be present at the March 9 hearing and to be permitted to present his complaints about counsel that same week. Withholding his complaints about Slick for these few days was fully justified.

As fate would have it, however, on March 9, Moore was again excluded from the hearing and was later informed that the case had been continued again for another week.

At this point, Moore realized that he would have to take affirmative steps to guarantee himself an audience with the court. And, indeed, he did so. Over the weekend following Friday March 9, Moore prepared a letter to the court explaining his difficulties with Slick and clearly expressing his desire to proceed pro se if no other solution was available. The letter was dated Saturday March 10 and postmarked Monday March 12. Moore acted as swiftly as reasonably could be expected. He cannot be faulted for the trial court's failure to address the matter any earlier.

On direct appeal, however, while quoting Windham's language that a request made in close proximity of trial need not be granted "without some showing of reasonable cause" for the timing of the request, Moore, 47 Cal. 3d at 79, quoting Windham, 19 Cal. 3d at 128, the court barely acknowledged the reasons for the timing of Moore's self-representation motion and certainly never directly confronted their legitimacy.

explained why these reasons did not provide the requisite showing of "reasonable cause." Indeed, while the majority took pains to distinguish the controlling federal authority and the dissent's reliance thereon, the majority never explained why Moore's motion was not sufficiently prompt other than to remark that "the trial court herein was well aware of defendant's stated reasons for delay in asserting his right to self-representation." Moore, 47 Cal. 3d at 81.

It is perverse to find a self-representation request untimely or unjustifiably delayed when it could not reasonably have been presented any earlier. Even if the appropriate standard for gauging the timeliness of a self-representation motion were the standard set forth in Windham, the state court erred in applying that rule to the facts of Moore's case. Under any viable standard, Moore's motion was timely.[35]

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[35] The Court emphasizes that, by engaging in the foregoing analysis, it has not accepted Moore's invitation to re-apply California's rule to determine whether the motion was timely under California state law. The state courts are the final expositors on the interpretation of state law and the state's interpretation is binding on the federal habeas court unless it is "untenable" or "appears to be an obvious subterfuge to evade consideration of a federal issue." McSherry v. Block, 880 F.2d 1049, 1053 n.3 (9th Cir. 1989), cert. denied, 499 U.S. 943 (1991). See also Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir.), cert. denied, 459 U.S. 1055 (1982); Aponte v. Gomez, 993 F.2d 705, 707 (9th Cir. 1993). As such, the federal habeas court is not empowered to decide whether the state court's ruling was a correct application of the state law. Estelle, 502 U.S. at 67-68. Cf. McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir.), cert. denied, 114 S.Ct. 622 (1993); Suniga v. Bunnell, 998 F.2d 664, 668 (9th Cir. 1993). That is a function exclusively relegated to the state courts.

There is no need to question whether the state court's interpretation of its rule is "untenable" or "an obvious subterfuge" since the analysis here is simply that, even if the Windham standard were in fact the federal constitutional standard, Moore's motion should have been found timely.

C. Moore's Motion Was Not Made for the Purpose of Delay

1. The State Courts' Factual Findings

The trial court did not find that Moore's motion was made for the purpose of delay. Rather, insofar as postponement of the trial date is concerned, the trial court rather clearly premised its ruling on the finding that delay would result -- not that delay was the motivation or purpose.

In fact, the master calendar court never inquired into Moore's justification for the timing of the motion. While the master calendar judge repeatedly told Moore that he would be permitted to represent himself only upon demonstrating that he was making a voluntary and intelligent waiver of his right to counsel (IA R.T. 12:19-13:5, 13:21-23, 20:10-18, 20:23-24, 24:2-7, 29:28-30:5), not once did the judge ever suggest that the outcome of Moore's motion would depend on whether there was "a very good reason" for the timing of his motion. As acknowledged by the Attorney General and the state supreme court, by virtue of Moore's letter, the court was "well aware of defendant's stated reasons" for the timing of his self-representation request. Contrary to the Attorney General's argument, however, the clear inference from this is that the trial court did not question the genuineness of Moore's request.[36]

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[36] Although the master calendar judge repeatedly stated that he had to assure himself that Moore was not attempting to "commit legal suicide", the trial court never expressed discomfort with the timing of Moore's motion. Indeed, the proximity to trial and potential need for any continuance -- let alone a substantial continuance -- were never raised until the master calendar judge impressed upon Moore the shallowness of Moore's understanding of the legal process.

While the trial court ultimately found that substitution of

(continued...)

The trial court did find that Moore was "unwilling" to proceed to trial that day if granted the right to represent himself.[37] Contrary to Respondent's argument, however, the trial court did not find that Moore invoked his right of self-representation in order to obtain a delay or to impede the administration of justice. The trial court found only that granting the request would have required a continuance, even if that effect was not initially intended by Moore.

"[A]bsent an affirmative showing of purpose to secure delay," however, this was not a sufficient ground for denying Moore his constitutional right to represent himself. Fritz, 682 F.2d at 784 (emphasis original). The alleged finding by the trial court that Moore was acting with a dilatory purpose is not entitled to a presumption of correctness because the trial court

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[36] (...continued)
counsel was unnecessary, the ruling established only that the master calendar judge had more faith in Slick's skills and preparation than did Moore. The trial court never insinuated and never found that Moore's complaints were fabricated, only that they were not sufficiently serious or objectively compelling in light of Slick's explanations. The trial court, however, was not the client; Moore was. Irrespective of the trial court's faith in Slick, Moore retained the right to proceed without counsel even close to the trial date so long as he was not invoking his pro se rights for an improper purpose. Cf. Lillie, 989 F.2d at 1056.

[37] This factual finding is entitled to a presumption of correctness under § 2254(d) and, on the current record, is not reasonably subject to debate. Yet it is not beyond dispute.
Moore never stated that his self-representation motion was conditioned on the granting of a continuance. Initially, it appears, Moore anticipated only a brief continuance, if any at all, to enable him to locate and interview Mr. Jones. The need for any significant continuance did not arise until the master calendar judge drilled Moore on his lack of understanding of basic legal principles. While the master calendar judge clearly impressed upon Moore the degree of his inability to manage a trial, the court never asked Moore whether he was willing to proceed to trial that day if granted pro se status.

never made such a finding. 28 U.S.C. § 2254(d)(1).

Moreover, nor did the state supreme court supply the missing ingredient. The state supreme court did not make an independent finding that Moore's motive was to thwart the proceedings. 28 U.S.C. § 2254(d)(1). Instead, it found no more than that the trial court was correct in its conclusion that delay would result and that the attendant delay would inconvenience the courts and prejudice the prosecution. Having noted, however, that the trial court never made such a finding,[38] the state appellate "finding" cannot be said to be either an independent finding of dilatory purpose nor can it be said to be "fairly supported by the record." Parker v. Dugger, 498 U.S. 308, 320 (1991).[39]

2. Even Assuming the State Supreme Court Made a Finding of Intent to Delay, the Finding Would Not Be Entitled to the Presumption on the State of This Record

Moreover, however, even if the state supreme court could be said to have made a factual finding on Moore's intent to delay, Ninth Circuit precedent clearly establishes that, on the facts of this case, this Court could not defer to that finding as

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[38] When the trial court discussed the possibility of a continuance, for example, it clearly did so in the context of forewarning Moore that the risks encountered by proceeding pro se included that he would be forced to start trial immediately. (IA R.T. 30:15-32:2.) Moore never suggested that he was unwilling to accept this as one of the drawbacks of self-representation. The court never suggested that Moore's desire for a continuance would itself be a basis for denying his self-representation motion.

[39] Moreover, it is debatable whether the trial court hearing was "full and fair" for purposes of the appellate court's alleged finding since the trial court never questioned the sincerity of Moore's reasons for the timing of his motion or whether they were motivated by an intent to delay. Fritz, 682 F.2d at 785. 28 U.S.C. § 2254(d)(2), (6). Nor is it clear that the "material facts were . . . adequately developed." Fritz, 682 F.2d at 785. 28 U.S.C. § 2254(d)(3).

presumptively correct. The Ninth Circuit's leading case in this area, Fritz, 682 F.2d 782, is clearly instructive.

As in Fritz, the only finding of dilatory purpose could have come from the appellate court.[40] In Fritz, as here, such a finding was not entitled to the statutory presumption of correctness because the material facts were not fully developed at the state trial court hearing and because the defendant was not afforded a full and fair opportunity to develop those facts at that hearing. A key consideration was that the trial court never inquired into the topic:

> Both the state presiding judge and the state trial judge held hearings on Fritz's motion to defend himself. Neither judge made an express inquiry into Fritz's purpose, however, focusing instead on the nature of the Faretta right and on Fritz's ability to waive knowingly his right to counsel.

Fritz, 682 F.2d at 785.

The Ninth Circuit acknowledged that the trial court hearings were not wasted efforts, but highly relevant on habeas -- albeit not complete:

> To be sure, much of the evidence adduced at the hearings is pertinent to Fritz's motivation. The evidence is incomplete, however, and material facts -- such as when it became clear that Fritz and [his attorney] had irreconcilable differences, and whether Fritz had a bona fide reason for not asserting his Faretta right before the morning of trial -- were never developed.

Fritz, 682 F.2d at 785.

So too it is here. The trial court judges here never expressly inquired into the reasons for the timing of Moore's motion. Further, unlike Fritz, the inferences from the facts are not conflicting. Moore had not previously dismissed attorneys

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[40] Respondent tacitly concedes as much by not even arguing that the trial court made the alleged finding of dilatory motive.

nor taken any other actions to impede the smooth progress of any earlier trial dates. The Attorney General identifies nothing in the circumstances surrounding Moore's case that could justify an inference that the motion was abusive other than the bare fact that it was presented close to trial.[41] The reasons for its timing having been clearly justified and never having been disputed by any court, the state court finding -- assuming for the sake of argument that there was such a finding -- would not be entitled to a presumption of correctness for an additional reason: it would not be "fairly supported by the record." 28 U.S.C. § 2254(d)(8).

3. The Undisputed State of the Record Indicates that Moore's Motion Was Not Made for Purpose of Delay

Moreover, however, the state court analyzed only half of the issue. While the state supreme court emphasized the Ninth Circuit's discussion of some of the factors that could support a finding of dilatory purpose -- the proximity to trial, whether delay would result, and prior dilatory conduct -- the state court inexplicably overlooked the remainder of the federal analysis, beginning with the very next sentence: "The inquiry, however,

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[41] The Attorney General briefly argues that Moore's request for a continuance in light of the prosecution's witness problem is strong indicia of a malevolent purpose. This is hollow rhetoric. First, there is no suggestion that, when Moore originally wrote his letter sometime before March 12, Moore had any idea that the prosecution might incur witness problems if the case were continued -- certainly none were indicated at the previous hearings where Moore was present. Further, there is no indication that, at the time Moore initially made his request, he intended to seek any continuance whatsoever. Finally, absent a showing of delay or an untimely request, the possibility that witnesses might suffer some minor inconvenience is simply not a factor in resolving whether a criminal defendant will be permitted to go to trial with or without an attorney.

does not stop there." Fritz, 682 F.2d at 784. The Ninth Circuit explained, and the state supreme court failed to continue:

> The court must also examine the events preceding the motion, to determine whether they are consistent with a good faith assertion of the Faretta right and whether the defendant could reasonably be expected to have made the motion at an earlier time.

Fritz, 682 F.2d at 784-85.

In this case, the "events preceding the motion" strongly suggest a finding of good faith on the part of Moore in interposing his self-representation motion.[42] Although the record could be supplemented to clarify the motivations and factors existing at the time of Moore's motion, the Attorney General has affirmatively disavowed the need for an evidentiary hearing. Further, the Attorney General has failed to identify any additional facts that it would present at such a hearing if given the opportunity to do so.[43]

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[42] Moore's primary dispute focused on Slick's degree of preparation. Slick apparently did not discuss his preparation and investigation until shortly before the March 5 conference. Indeed, even at the March 16 hearing, when Slick stated that he had conferred with Moore, Moore concurred but clarified that the discussion was limited to one part of one witness's testimony. The trial court asked for no further clarification from Slick about the degree of his conferences with Moore nor gave any indication that it found Moore's statement to be unbelievable.

[43] Petitioner, by contrast, has specifically averred that he could and would supplement the record to further bolster his position on all unresolved factual issues. Fritz, 682 F.2d at 784-86. The Attorney General suggests that Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, bars an evidentiary hearing on this claim. It is not entirely clear that this would be so. Tamayo-Reyes held that, when a habeas petitioner actually had an evidentiary hearing in state court and negligently failed to submit critical evidence that was available at the time, he would have to prove "cause and prejudice" before being entitled to an evidentiary hearing under one of the six circumstances in which Townsend v. Sain, 372 U.S. 293, 313-18 (1963), held that a hearing would be mandatory. Tamayo-Reyes, 112 S. Ct. at 1721. (continued...)

D. The Self-Representation Motion Was Improperly Denied

The trial court offered several other miscellaneous reasons allegedly justifying the denial of the motion. As explained below, none are legally sound.

The trial court's reference to "interfer[ence] with the orderly administration of justice" is not supportable since the record does not establish that a continuance would have been absolutely necessary. At the outset of the hearing, the only additional task Moore sought to perform was to have Mr. Jones interviewed. Had Moore's motion been addressed closer to the time it was received it is entirely possible that no continuance would have been requested but for the trial court's persistence in impressing upon Moore the degree of his unfamiliarity with the adjudicatory process.[44]

Furthermore, once the trial court persuaded Moore that he was not ready to begin trial immediately, the trial court never

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[43] (...continued)
It is far from clear that Moore's failure to further develop the reasons for the timing of his motion can properly be criticized as "negligent." Further, Tamayo-Reyes did not purport to limit the five other situations in which an evidentiary hearing is mandatory. Nor did Tamayo-Reyes purport to constrain the instances in which the federal court could exercise its discretion to hold a hearing. Most significantly, however, Tamayo-Reyes never suggested that its "cause and prejudice" standard would be applicable to situations where the issue was not only not decided by the state tribunal, but had not even been an issue in dispute.

[44] This is not to say that the trial court erred in impressing upon Moore the dangers of representing himself. To the contrary, such information was crucial to ensuring that Moore's waiver of counsel was informed and intelligent. Faretta, 422 U.S. at 835. United States v. Mohawk, 20 F.3d 1480, 1484-85 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987). Rather, the crucial factor here is that Moore was not initially seeking a continuance and, therefore, cannot be accused of having interposed the motion for an ulterior purpose.

inquired into how much time Moore envisioned in order to prepare himself for trial. Certainly Moore would not have been entitled to a continuance long enough for him to attend law school and pass the bar. (IA R.T. 31:16-19.) The master calendar court knew, however, that several motions would have to be heard before trial and that the witnesses for those motions were not all local. The judge, therefore, also knew that trial would not start that same day nor, likely, within the next week. In light of pending motions, had Moore requested only a week or a few days to prepare for trial, it is unlikely that any continuance at all would have been necessary. Moore likely would have been able to be ready within the time already set for trial. The master calendar judge, however, never asked.

Moreover, Moore never conditioned his self-representation rights on the granting of a continuance; he only said that he was not ready to begin trial "this afternoon." Although Moore had expressed a desire for a continuance, he never suggested that he desired to withdraw the pro se request if a continuance was not to be granted. Since Moore was willing to accept pro se status even if the trial were not continued beyond "this afternoon," the trial court erred using Moore's desire for a continuance as a basis for denying Moore's request to proceed pro se.

The master calendar judge's reliance on Slick's having previously declared ready for trial is also an insufficient basis for denying Moore's motion. See Chapman, 553 F.2d at 894, cited with approval by Maxwell, 673 F.2d at 1036; Fritz, 682 F.2d at 784.

To impute to Moore Slick's declaration of "ready" during a

conference that Slick had effectively prevented Moore from attending and at a time when Slick knew that Moore disagreed with his state of readiness and wished to discharge him is premised on the "tenuous and unacceptable legal fiction" expressly criticized by the Supreme Court. Faretta, 422 U.S. at 821.

The judge's reliance on the state law speedy trial clock is also unavailing. Although the hearing was held on the 54th of 60 allowable days, state law allowed the trial to commence up to 10 days thereafter. Cal. Pen. Code § 1382(b). The State thus had sixteen days, not six, in which to bring Moore to trial. More significantly, however, is that the speedy trial time is subject to waiver by the defendant. There is nothing to suggest that the State could not have conditioned an extended continuance on Moore's willingness to stipulate to the abeyance of the speedy trial clock during the continuance.

Next, neither the trial court nor the Attorney General identify anything unusual in coordinating the trial date with the out-of-state witnesses other than the normal difficulties in rearranging travel and vacation schedules. The Court has found no decision holding that a defendant's right to represent himself can appropriately be conditioned on the convenience of witnesses' vacation schedules. The defendant's constitutional rights surely must take precedence.[45]

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[45] Unlike the California Court of Appeal case of Ruiz, there is no allegation that Moore was threatening witnesses or hoping to use the delay as a means of deterring witnesses from testifying against him. Further, the prosecution's expressed concern of losing witnesses is beguiling. Having voluntarily postponed the initial filing of the case for nearly five and a half years and still having managed to maintain control over its

(continued...)

The final reason given by the master calendar judge was that Moore was "unwilling" to proceed to trial that day. Regardless of the accuracy of this finding, it is a classic red herring. The trial was not expected to start "that afternoon." Indeed, not even the prosecutor was ready to start that day -- he had already announced a need for "one or two days lead time" to have the out-of-state witnesses to come in for pre-trial motions. Moreover, a defendant's inability to commence trial proceedings immediately is not, without more, a basis for denying a request to proceed pro se. Armant, 772 F.2d at 554-58; Fritz, 682 F.2d at 784-85.

E. Conclusion

Moore's motion for self-representation satisfied all the requirements entitling him to permission to represent himself. Improperly forcing counsel on a defendant against his will is structural error and, therefore, "not amenable to harmless error analysis." Arlt, 41 F.3d at 524, quoting Adams, 875 F.2d at 1445. Peters, 33 F.3d at 1193. "The improper denial of this right [to represent oneself] is 'per se prejudicial error' and thus requires automatic reversal of a criminal conviction." Arlt, 41 F.3d at 524, citing Savage, 924 F.2d at 1466.[46]

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[45] (...continued)
witnesses for an additional year, there is no credible suggestion that the district attorney could not have weathered a few additional weeks in order to allow Moore to prepare for a trial at which he would present his own defenses, not those developed by Slick.

[46] The Attorney General suggests that, if the writ is granted on this claim, the appropriate remedy should be to force Moore to proceed pro se at any retrial. Contrary to the Attorney General's insinuations, this is inconsistent with Moore's request (continued...)

VI. The Mid-Trial Motion to Discharge Slick and Proceed Pro Se

Moore's final claim under submission challenges the trial court's denial of permission to discharge Slick and proceed pro se beginning with the defense closing argument. The Attorney General presents two defenses -- that, as a mid-trial motion, it was untimely and that, on the merits, the trial judge acted within his discretion.

A. Scope of the Substantive Right Involved

The parties both treat this claim as a genuine dispute over the scope of a criminal defendant's self-representation rights. Moore styles his claim as a denial of his right to represent himself. The trial judge recognized the motion as such. The Attorney General does not contend that this is simply a disguised request designed to circumvent the general rule that represented defendants need not be granted the right to address the jury. E.g. United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973).

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[46] (...continued)
to the trial court. While Moore plainly expressed that, in entire scheme of things, he would prefer to be represented by a lawyer, he was also very clear that "[i]f the court would not order substitute counsel, he wished to represent himself." Adams, 875 F.2d at 1445. The condition suggested by the Attorney General would thus only be relevant if the trial court were to appoint Slick as defense counsel for any retrial.

In light of their previous conflicts and the results of the trial, after reviewing the vigorous pleas by Moore to proceed without Slick despite the overwhelming obstacles, there is little doubt that if required to make the choice, Moore would again opt to proceed pro se rather than be represented by Slick. This, however, is a choice that need be made only if Slick is again appointed defense counsel. If the situation arises, Moore will have to make the choice voluntarily and intelligently, fully informed of the consequences of his actions. Faretta, 422 U.S. at 835, Mohawk, 20 F.3d at 1484. This is not a decision that can or should be thrust upon him without a hearing.

In support of his claim, Moore relies heavily on an observation included in the Faretta opinion itself. In appraising the very existence of a right of self-representation, the Supreme Court pointed out its previous implicit recognition of such a right. The Court in Faretta observed that, in Snyder's discussion of the importance of the defendant's right to be present in the courtroom, the Court remarked:

> [T]he "defense may be made easier if the accused is permitted to be present at . . . the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself."

Faretta, 422 U.S. at 816 (emphasis in original) (quoting Snyder, 291 U.S. at 106).

Based on this excerpt from Faretta, Moore argues that he had an unconditional right to represent himself at closing argument and that the trial court's denial of this motion violated this constitutional right.[47]

B. The Claim Cannot Be Denied on the Basis of Timeliness

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[47] While the parties discuss other cases, the "right" involved truly emanates from Faretta and nowhere else. While a handful of cases do address the contours of a criminal defendant's right to present closing argument, none of them do so in the context of request for self-representation. Rather, the cases either involve situations where the defendant was represented by counsel, did not want to waive counsel, and requested "hybrid" co-counsel status for closing argument, e.g. Dellinger, 472 F.2d at 408, or involved situations where the trial court actually permitted the defendant to present closing argument and the issues on appeal were whether the partial waiver of counsel was knowing and voluntary, e.g. Watts v. United States, 273 F.2d 10, 11-12 (9th Cir. 1959), cert. denied, 362 U.S. 982 (1960).

A different situation arises when the defendant did not testify and is seeking to use closing argument as an attempt to present evidence to the jury without being under oath or subject to cross-examination. Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991); United States v. Tucker, 773 F.2d 136, 141 (7th Cir. 1985), cert. denied, 478 U.S. 1022 (1986).

The Attorney General's first defense rests on the principle recognized in virtually all jurisdictions -- that a self-representation motion is generally untimely if not asserted until mid-trial. Smith, 780 F.2d at 811-12.

While the general rule that mid-trial requests are untimely may appear to conflict with the language from Faretta quoted above, id., 422 U.S. at 816, the two need not be harmonized here. The timeliness of Moore's second request to represent himself "did not underlie the district court's exercise of its discretion to deny the motion, and thus we do not find it dispositive of this issue." Walker, 915 F.2d at 483. Accord Price, 474 F.2d at 1227, Peters, 33 F.3d at 1192. Further, "[t]he record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion." Price, 474 F.2d at 1227.[48]

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[48] As observed by the Fifth Circuit, the propriety of demarcating self-representation requests by reliance on whether the trial has commenced is not beyond reproach:

> Faretta casts doubt on the practice of characterizing the pro se right as unqualified before trial but committed to the discretion of the court thereafter. United States v. Garcia, 517 F.2d 272, 277 n.4 (5th Cir. 1975), has been read to suggest that Faretta may have "eroded" earlier decisions that relied on this distinction between pre- and mid-trial assertion of the right.

Chapman, 553 F.2d at 893 (citations and footnote omitted). Accord Barnes, 258 Ark. at 570-71. Nonetheless, the distinction is adhered to by the Ninth Circuit and, therefore, binding on this Court. Smith, 780 F.2d at 811-12.

The holding in Smith is, of course, distinguishable in numerous respects. If nothing else, the holding was impacted by the fact that not only was the motion not raised before trial, but it had not even been raised at the defendant's first opportunity to do so: "the request, made half-way through trial, was not timely because it was based on matters that occurred prior to trial." Smith, 780 F.2d at 812.

(continued...)

C. The Trial Court Failed to Consider the Relevant Factors for Exercising its Discretion

Even if the motion were considered untimely, however, the result is that the right is subject to the exercise of the trial court's discretion in light of various factors -- the need to minimize disruptions, considerations of convenience and delay, maintaining continuity and the ongoing flow of trial proceedings, avoiding jury confusion, and the defendant's reasons for the timing of the request and the reasons for the request itself. United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986); United States v. Dunlap, 577 F.2d 867, 868 (4th Cir.), cert. denied, 439 U.S. 858 (1978); United States v. Tucker, 773 F.2d 136, 141 (7th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). The California Supreme Court has identified these same factors as the appropriate guide for the trial court. Windham, 19 Cal. 3d at 128-29. On one significant point there is no dispute: the

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48 (...continued)

Here, by contrast, while Moore was clearly disillusioned with Slick prior to trial, he raised those concerns forthwith. His motion was denied. Moore renewed his request to represent himself beginning with closing argument upon learning -- in the middle of trial -- that Slick had no intention of highlighting a significant number of inconsistencies in the prosecution's key witness's testimony. Unlike the defendant in Smith, it is not reasonably probable that Moore could have raised these additional concerns any earlier.

Nor was this a situation where "the trial [which was already underway] would need to be continued if the request were granted." Id., 780 F.2d at 812. Moore emphasized that he was ready to proceed with closing argument forthwith. There is no contention that delay was either intended or would result.

Finally, also unlike Smith, it is not at all clear that Moore can properly be penalized for having made a mid-trial request when all his earlier requests had in fact been denied. Unlike Smith, Moore's first assertion of the right of self-representation was not during the middle of trial, but well before the beginning of the actual trial. His second assertion of his self-representation rights -- the one made during trial -- was based on events that had transpired during trial.

trial court failed to consider any of these factors.

Moore had substantial and legitimate reasons for requesting pro se status. The essence of the prosecution's case was that Moore developed the plan to go to the Crumb's apartment to steal their recently-collected rent receipts and that, after the robbery, the Crumbs would be killed. The prosecution contended that Moore, his co-defendant Lee Harris, and the immunized accomplice Avery went to the Crumb's apartment, stole money and jewelry and, while there, Moore personally killed the Crumbs.

Moore was a former tenant of the building and admitted that he had devised the plan to rob the Crumbs. He testified, however, that he did not participate in the robbery and that murder was never part of the plan. According to Moore, earlier on the day of the killings, he went by the apartment building with Avery and Harris and told them how they could enter. He specifically did not go with Avery and Harris that evening because he knew that the Crumbs would recognize him. This was arguably corroborated by the testimony of Mr. Jones, who is the person that enabled Avery and Harris to enter. Jones stated that he knew Moore, would have recognized Moore, and did not see Moore at the apartment building that night.

Moore's explanation was no great testament to his moral fiber and could have amply supported convictions for the burglary, robbery, and possibly also felony-murder. Nonetheless, if the jury believed his version of events -- or at least had a reasonable doubt as to the prosecution's theory -- it could not have found that the special circumstances were true, which required that Moore participated in the killings or intended for

the Crumbs to be killed. Without the special circumstances, Moore was ineligible for the death penalty.

As plainly recognized by both the prosecuting attorney and the California Supreme Court, the case against Moore rested entirely on the jury's perception of Terry Avery, the immunized accomplice who was the prosecution's key witness. The district attorney conceded during closing argument to the jury, "Terry Elaine Avery [is] the key to this case because she's the key to the special circumstances, who was present, who was there and actively committed the crimes, no question." On appeal, the state supreme court concurred, opening its discussion of the guilt phase evidence by remarking "The case against defendant was based almost entirely on the testimony of Terry Avery, who was granted immunity from prosecution in exchange for her testimony." Moore, 47 Cal. 3d at 71.

As to the dispute over closing argument, Moore's initial disagreement with Slick arose when Slick refused to present any evidence or argument at all. After further discussion, however, Slick acquiesced. When Moore withdrew his request to discharge Slick, Moore clearly stated that he was doing so based on his understanding that Slick had promised to point out, during closing argument, the inconsistencies in Avery's testimony.

After the prosecution had delivered a substantial portion of its opening argument, Moore and Slick again discussed the substance of the defense closing. The relationship again began to falter. Because the essence of the defense was that Moore was not present, Slick proposed focusing on the inconsistencies in Avery's testimony relating to whether Moore was, or could have

been, present. While Moore agreed that Slick's focus was valid and one which he wanted highlighted to the jury, Moore felt that the challenge to Avery should be much more broadly based -- to wit, that Avery was an entirely unreliable witness.

Moore wanted the jury to be reminded that not only was Avery's testimony inconsistent with the physical evidence and conflicting as to Moore's presence, but that Avery's testimony was inconsistent in many other respects as well. One of the most significant arguments raised by Moore related to the prosecution's emphasis during summation on Avery's testimony that she had "turned herself in." Moore wanted the jury reminded, however, that law enforcement testimony clearly indicated that Avery had in fact been turned in involuntarily by her mother.

Throughout its colloquy with Moore, the trial judge repeatedly confirmed that Moore's proposed arguments were legitimate, but expressed confidence that those arguments would likely be presented by Slick. Each time, Moore confirmed that Slick did not intend to make the arguments that Moore was proposing. In case Moore was not sufficiently clear, Slick removed any residual doubt: "There are some inconsistencies Mr. Moore just mentioned that I do not intend to argue. . . . [¶] I don't want to distract this jury by talking about things that I don't feel are germane to his guilt or innocence of the special circumstances and I'll not do so."[49]

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[49] It is not disputed that "appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987) (citing Henry v. Mississippi, 379 U.S. 443, 451 (1965)). Contrary to the Attorney General's suggestion,

(continued...)

This was no small dispute. In a case decided only months before the events at issue, the Supreme Court affirmed that

> The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial.

McKaskle, 465 U.S. at 174 (emphasis original).

Moore echoed these concerns in arguing to the trial judge:

> [I]f Ron Slick is wrong in his arguments, his arguments don't prove to be successful to the jury, he's not going on death row, I am. He's not going to get a life sentence, I am. It is my life I am fighting for.

Moore's request to proceed pro se for closing arguments cannot be derided as involving only an insubstantial part of the trial. As the Supreme Court observed in a case decided the same day as Faretta, "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial." Herring v. New York, 422 U.S. 853, 858 (1975).

The other relevant factors also favored Moore. The timing of Moore's motion was justified since it was prompted by information that he learned during the middle of trial and reasonably could not have known prior thereto. Furthermore, all

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[49] (...continued)
however, the issue here is not whether Slick's choice of topics for argument was within the realm of professionally reasonable judgment. The instant claim does not charge that Slick's closing argument was itself constitutionally deficient. Cf. Wade v. Calderon, 29 F.3d 1312, 1324-25 (9th Cir. 1994), cert. denied, 115 S.Ct. 923 (1995). Nor does Moore argue that he had a right to control the topics addressed by trial counsel during closing argument. Rather, he argues, that Slick's proposed argument was "not the defense guaranteed him by the Constitution, for . . . it was not his defense." Faretta, 422 U.S. at 821. Moore felt so strongly about this that he was willing to waive his right to counsel and represent himself for the remainder of trial.

indications in the record suggest that Moore was a cooperative and respectful litigant. Allowing him to represent himself beginning with closing argument would not have created any disruption. Nor would granting the request have caused inconvenience, delay, or interfered with the flow of the trial. Moore clearly enunciated the topics he wanted to cover in closing arguments and confirmed that he was ready to proceed forthwith.

At least in the context of this case, where Moore himself had actually taken the stand and testified and was subjected to cross-examination, allowing Moore to deliver closing argument would have resulted in no more jury confusion than would any other case involving a pro se litigant. Indeed, probably less so. When the trial judge cautioned Moore that he would not be allowed to present additional evidence during closing argument and would be limited to the evidence in the record, Moore expressly acknowledged this limitation, identified the topics he proposed to argue, and clearly explained how those matters were already established in the record.

The trial judge failed to consider the factors that it was required to rely upon in guiding its discretion. Had it considered those factors, it would have been compelled to conclude that Moore's request should be granted.

D. Conclusion

The error in denying Moore the right to represent himself beginning at defense closing argument was reversible per se. See supra Section V(E).

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ORDER

IT IS HEREBY ORDERED that Petitioner's motion for summary judgment be, and hereby is, **GRANTED** as to Claims A and C; to wit, Petitioner's motions to proceed pro se prior to jury empanelment, and prior to closing argument, respectively.

IT IS FURTHER ORDERED that Petitioner's motion for summary adjudication be, and hereby is, **DENIED**, and the following issues are hereby summarily adjudicated on the Court's own motion:

(1) Moore's exclusion from the March 5 and March 9 hearings did not deprive him of due process,

(2) The trial court conducted a sufficient inquiry on Moore's motion for substitution of counsel,

(3) The trial court did not prejudicially err in denying Moore's motion for second counsel, and

(4) Moore's claim that the trial court unconstitutionally denied him co-counsel status or appointment of advisory counsel is barred under the retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989) (plurality).

IT IS FURTHER ORDERED that Petitioner's motion for summary judgment be, and hereby is, **DENIED** as to Claim B; to wit, that the trial court improperly denied his motion for substitution of counsel.

IT IS FURTHER ORDERED that Respondent's motion for summary judgment be, and hereby is, **DENIED** as moot.

IT IS FURTHER ORDERED that Moore's petition for writ of habeas corpus be, and hereby is, **GRANTED** and that the judgment of conviction and sentence of death in this case be **VACATED AND SET ASIDE**, as are any proceedings related to carrying out that judgment. Respondent shall release Moore from custody after the expiration of 60 days unless, within 60 days hereof, the State of California grants Moore the right to a new trial on all guilt, special circumstance, and penalty issues in accordance with applicable California law and the United States Constitution. 28 U.S.C. § 2243.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately notify the Warden of San Quentin Prison of this Court's ruling.

IT IS SO ORDERED.

Dated: March 31, 1995.

DAVID V. KENYON
United States District Judge

APPENDIX B

FILED
CLERK, U.S. DISTRICT COURT
MAY - 4 1995
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES EDWARD MOORE,
Petitioner,
v.
ARTHUR CALDERON,
Respondent.

CV 91-5976 KN

ORDER DENYING WITHOUT PREJUDICE ATTORNEY GENERAL'S APPLICATION FOR STAY

(DEATH PENALTY)

Based on the papers submitted and counsels' statements at the May 4, 1995 telephone status conference, the Court **DENIES WITHOUT PREJUDICE** the Attorney General's application for a stay. However, the original sixty-day stay is still in effect, and should the Attorney General require more time in which to seek a stay with the Ninth Circuit beyond the current period, counsel may file an application for a reasonable extension of time.

IT IS SO ORDERED.

DATED: May 4, 1995

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

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APPENDIX C

provision of the United States Sentencing Guidelines, § 4B1.1. The adjustment was based on two offenses to which Carr pled guilty in 1985: (1) sale of a "nickel baggie" of marijuana for $5, and (2) sale of .26 grams of cocaine for $25. Despite the small quantities involved in the prior offenses, the district court refused to grant a downward departure and sentenced Carr to 262 months, the low end of the guideline range.[1]

Carr argues that, as applied to his case, § 4B1.1 violates the Eighth Amendment and the Due Process Clause because its 30-year mandatory minimum is grossly disproportionate to the seriousness of his prior offenses. We have not previously addressed whether an application of the guidelines' career offender provision that is disproportionate to the offenses involved may violate the Eighth Amendment's Cruel and Unusual Punishment Clause. *See United States v. Reyes*, 8 F.3d 1379, 1385-86 n. 14 (9th Cir. 1993); *see also id.* at 1393-94 (Brunetti, J., dissenting).

We conclude that Supreme Court precedent forecloses Carr's Eighth Amendment argument. *See Harmelin v. Michigan*, 501 U.S. 957, 961, 996, 111 S.Ct. 2680, 2684, 2702, 115 L.Ed.2d 836 (1991) (plurality opinion) (upholding against an Eighth Amendment challenge a sentence of life without parole for a first offense of possession of 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370-71, 375, 102 S.Ct. 703, 703-04, 706, 70 L.Ed.2d 556 (1982) (rejecting a challenge to a 40-year sentence for possession of less than nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263, 265, 100 S.Ct. 1133, 1134, 63 L.Ed.2d 382 (1980) (upholding a life sentence imposed under a "recidivist statute" where the three felonies involved were (1) passing a forged check for $28.36, (2) fraudulently using a credit card to obtain $80 worth of goods and services, and (3) obtaining $120.75 by false pretenses). Although harsh, Carr's sentence was less severe relative to his offenses than the sentences upheld in these cases—certainly less than in *Rummel*.

[1, 2] Accordingly, we follow a number of cases in other circuits[2] and hold that, under the circumstances of this case, Carr's sentence was not so disproportionate to the gravity of his offenses as to violate the Eighth Amendment. We also reject Carr's contention that § 4B1.1 violates due process. *See United States v. Spencer*, 25 F.3d 1105, 1112 (D.C.Cir.1994) (citing *United States v. Jones*, 907 F.2d 929, 930 (9th Cir.1990)).[3]

AFFIRMED.

Charles Edward MOORE, Jr., Petitioner-Appellee/Cross-Appellant,

v.

Arthur CALDERON, Warden, Respondent-Appellant/Cross-Appellee.

Nos. 95-99009, 95-99013.

United States Court of Appeals, Ninth Circuit.

May 26, 1995.

Following California Supreme Court's affirmance of his conviction for first-degree murder, robbery, and burglary, and his death sentence, 47 Cal.3d 63, 252 Cal.Rptr. 494, 762 P.2d 1218, state prisoner sought habeas cor-

1. We have held that the district court may grant a discretionary downward departure from a sentence enhanced pursuant to § 4B1.1 on the ground that the career offender provision does not adequately take into account "the disproportionate treatment of drug offenders sentenced to the same penalty range for offenses involving drug quantities of exceptionally different orders of magnitude." *United States v. Reyes*, 8 F.3d 1379, 1385 (9th Cir.1993).

Carr argues that the district court erred by not considering this basis for departure. It is clear, however, that the sentencing judge was aware of her authority to depart downward on the ground that Carr's offense level overrepresented his criminal history. Her refusal to grant such a departure is not reviewable on appeal. *United States v. Morales*, 898 F.2d 99, 101-03 (9th Cir. 1990).

2. *See, e.g., United States v. Spencer*, 25 F.3d 1105, 1111 (D.C.Cir.1994); *United States v. Garrett*, 959 F.2d 1005, 1009 (D.C.Cir.1992); *United States v. Gordon*, 953 F.2d 1106, 1107 (8th Cir.1992); *United States v. McLean*, 951 F.2d 1300, 1303-04 (D.C.Cir.1991).

3. The issues raised by Carr are dealt with in a separate unpublished memorandum disposition.

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pus relief. The United States District Court for the Central District of California, David V. Kenyon, J., found that prisoner's constitutional right to represent himself had been violated, and prisoner was scheduled for release pending appeal. The state moved for stay pending appeal. The Court of Appeals held that the state did not meet its burden of demonstrating a substantial case on the merits.

Stay denied.

O'Scannlain, Circuit Judge, filed dissenting opinion.

1. Habeas Corpus ⇐822

Even when the public's and the state's interests weigh against release of successful habeas petitioner pending the state's appeal, the state nonetheless must demonstrate substantial case on the merits in order to prevent petitioner's release.

2. Habeas Corpus ⇐822

Habeas petitioner whose constitutional right to represent himself was found to have been violated was entitled to release pending appeal where the state failed to make sufficiently strong showing that it was likely to succeed on the merits, even though petitioner had been convicted of first-degree murder and sentenced to death and thus the public's and the state's interests weighed against release. U.S.C.A. Const.Amend. 6.

Peggy S. Ruffra, Deputy Atty. Gen., San Francisco, CA, for respondent-appellant.

Brian Pass, Irell & Manella, Los Angeles, and Marianne D. Bachers, San Francisco, CA for petitioner-appellee.

Appeal from the United States District Court for the Central District of California.

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

[1, 2] Respondent–Appellant's motion for stay pending appeal is DENIED.[1]

This case is expedited, and a briefing schedule will be issued shortly.

Judge O'SCANNLAIN would grant the motion for stay.

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully disagree that we should order the release pending appeal of a double murderer who was sentenced to death by a jury of his peers and whose conviction was affirmed in a lengthy decision by the California Supreme Court.

I have no doubt that Moore's habeas corpus petition raises substantial constitutional questions, as identified in the district court's opinion. Nor can I condone the state's failure to file this motion for stay until almost the last minute before Moore's scheduled release date. Nonetheless, I believe that principles of comity and federalism require us to afford the state the opportunity for full appellate consideration of the district court's decision. Thus, instead of rushing to judgment, the appropriate course would be to permit full briefing and oral argument on the merits before taking further action. I am convinced that we can expedite the process sufficiently to minimize any prejudice to Moore while still providing the state the careful appellate review properly due it.

However, the majority has determined that a stay is inappropriate because the state has not made a sufficiently strong showing that it is likely to succeed on the merits pursuant to *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). Although it is very possible that Moore's reliance on *Fritz v. Spalding*, 682 F.2d 782 (9th Cir.1982), is well-placed, I am not willing effectively to decide that California violated Moore's constitutional rights based on only the most cursory review in this court, without the benefit of appropriate briefing, let alone oral argument. The California courts which examined and upheld Moore's conviction are entitled to a more considered treatment. Indeed, the fact that the district court proceedings consumed almost three-and-one-half years indicates that the issues are deserving of careful analysis by this court.

In addition, by focusing solely on the state's likelihood of success on the merits, the majority ignores the other factors that the *Hilton* Court deemed worthy of consideration in deciding a motion for a stay. For instance, the Court explicitly stated that a court may take into account the "possibility of flight" and "the risk that the prisoner will pose a danger to the public if released." *Id.* at 777, 107 S.Ct. at 2119. Further, we may consider the state's interest in continuing custody over the defendant. That interest "will be strongest where the remaining portion of the sentence to be served is long." *Id.* Here, these factors weigh strongly in favor of granting the stay.

Moore has been convicted of two cold-blooded murders. A jury determined that Moore and two cohorts bound and gagged Mr. and Mrs. Robert Crumb of Long Beach, California, robbed them, and then brutally beat and stabbed them to death. Moore has also been identified as the murderer of a Woolworth's store manager during another robbery in Kansas. Moore was accused of abducting the manager at gunpoint, and, after ignoring the manager's pleas for his life, shooting him to death. That Moore poses a danger to the public is without question.

Further, Moore is under a death sentence. Consequently, he poses a substantial risk of flight as he has nothing to lose and everything to gain by fleeing. Releasing Moore under such circumstances is likely to have disastrous consequences. Finally, because Moore's sentence is so severe, the state has a substantial interest in continuing to confine him.

I recognize that a district court's finding of a constitutional violation is not a matter to be taken lightly. However, the Supreme Court has set forth common-sense considerations to guide a federal court in determining whether or not to order release of a state prisoner before it can give full consideration to the merits. Such considerations are compelling here and require grant of the state's motion for stay pending appeal.

1. In light of the dissent, we add only this to our denial of the stay: *Hilton v. Braunskill* states that even when the public's and the state's interests weigh against release the state nonetheless must "demonstrate a substantial case on the merits." 481 U.S. 770, 778, 107 S.Ct. 2113, 2120, 95 L.Ed.2d 724 (1987). Given our law on the issue of a defendant's right to represent himself pro se, we cannot say that the state is able to meet that burden. *See, e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982); *Fritz v. Spalding*, 682 F.2d 782, 784–85 (9th Cir.1982); *Savage v. Estelle*, 924 F.2d 1459, 1463 n. 7 (9th Cir.1990), *cert. denied*, 501 U.S. 1255, 111 S.Ct. 2900, 115 L.Ed.2d 1064 (1991). Of course, we *must* make the decision at this time, not after we have had full briefing and decided the case on the merits.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff–Appellee,

v.

$405,089.23 U.S. CURRENCY, et al., Defendants.

Charles Arlt, James Wren, Payback Mines, Claimants–Appellants.

No. 93–55947.

United States Court of Appeals, Ninth Circuit.

May 30, 1995.

Charles Wesley Arlt, Lompoc, CA, and James Eli Wren, Lompoc, CA, pro se, for claimants-appellants.

Mark A. Feldman, Asst. U.S. Atty., Los Angeles, CA, for plaintiff-appellee.

Jeffry K. Finer, Finer & Pugsley, P.S., Spokane, WA, Jeffrey Steinborn, Seattle, WA, Brenda Grantland, Forfeiture Endangers American Rights, Mill Valley, CA, Shawn R. Perez, Santa Ana, CA, for defendant-appellant.

Richard S. Troberman, Seattle, WA, E.E. Edwards, III, Nashville, TN, David Michael, San Francisco, CA, David B. Smith, Alexandria, VA, Attorneys for *Amicus Curiae* National Association of Criminal Defense Lawyers.

Before: POOLE and REINHARDT, Circuit Judges, and TANNER,* District Judge.

ORDER

The opinion filed September 6, 1994, 33 F.3d 1210, is amended as follows:

* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX D

Supreme Court of the United States

No. A-910

ARTHUR CALDERON, WARDEN,

Applicant,

v.

CHARLES EDWARAD MOORE, JR.,

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the applicant, the response and the reply filed thereto,

IT IS ORDERED that the stay heretofore issued by the undersigned on May 30, 1995, be, and the same is hereby vacated. The application for stay is, in all respects, denied.

/s/ Sandra D. O'Connor

Associate Justice of the Supreme Court of the United States

Dated this 9th day of June, 1995

APPENDIX E

FILED
JUL 11 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, Jr., Petitioner-Appellee/ Cross-Appellant,	Nos. 95-99009, 95-99013 D.C. No. CV-91-05976-KN
v.	DEATH PENALTY
ARTHUR CALDERON, Warden, Respondent-Appellant/ Cross-Appellee.	ORDER

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The Attorney General of the State of California shall, within ten days of the date of this order, advise the court as to petitioner-appellee's custody status and whether the State has granted a new trial in accordance with the order of the district court. The parties shall keep this court informed of all significant developments involving a new trial and any change in custody status of petitioner-appellee.

APPENDIX F

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
STAN M. HELFMAN
Supervising Deputy Attorney General
PEGGY S. RUFFRA
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San Francisco, California 94105
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, Petitioner-Appellee/ Cross-Appellant, v. ARTHUR CALDERON, Warden, California State Prison at San Quentin, Respondent-Appellant/ Cross-Appellee.	Nos. 95-99009, 95-99013 D.C. No. CV 91-5976-KN CAPITAL CASE RESPONSE TO ORDER RE: APPELLEE'S CUSTODY AND TRIAL STATUS

On July 11, 1995, this Court issued an order requiring the Attorney General to advise the Court of appellee's custody status and whether the State granted appellee a new trial following the District Court's order granting the petition for writ of habeas corpus. The Los Angeles County District Attorney granted appellee a new trial on

May 30, 1995. Appellee is currently in the custody of Los Angeles County Sheriff Sherman Block, and is incarcerated at the Los Angeles County Jail pending retrial. Appellee's request to represent himself on retrial was granted. Appellee waived time and the case is scheduled for a pretrial conference on September 6, 1995.

Dated: 7/20/95

Peggy S. Ruffra
PEGGY S. RUFFRA

DECLARATION OF SERVICE BY MAIL

Case Name: ***Charles Edward Moore*** v. ***Arthur Calderon, Warden*** No.: 95-99009
United States Court of Appeals for the Ninth Circuit

I declare that:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **July 20, 1995**, I served the attached

Response to order re Appellee's custody and trial status

in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Room 300, San Francisco, California 94105, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

MARIANNE D. BACHERS
Attorney at Law
900 North Point St., ste. 220
San Francisco, CA 94109

IRELL & MANELLA
Brian Pass
1800 Avenue of the Stars, Ste. 900
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on **July 20, 1995**.

MABELENE ALHAMBRA
(Typed Name)

(Signature)

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
STAN M. HELFMAN
Supervising Deputy Attorney General
PEGGY S. RUFFRA
Deputy Attorney General
[State Bar No. 117315]
50 Fremont Street, Suite 300
San Francisco, California 94105
Telephone: (415) 356-6142
Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE,

Petitioner-Appellee/
Cross-Appellant,

v.

ARTHUR CALDERON, Warden,
California State Prison at San Quentin,

Respondent-Appellant/
Cross-Appellee.

Nos. 95-99009, 95-99013

D.C. No. CV 91-5976-KN

CAPITAL CASE

FURTHER RESPONSE TO ORDER RE: APPELLEE'S TRIAL STATUS

TO THE HONORABLE JUDGES OF THE NINTH CIRCUIT COURT OF APPEALS:

On July 11, 1995, this Court issued an order requiring, inter alia, that the parties keep the Court informed of all significant developments involving the retrial of

appellee/cross-appellant [hereafter appellee] on capital charges in state court. We previously informed this Court of appellee's trial status through September 6, 1995. This response constitutes a further update on the status of appellee's trial.

Appellee continues to represent himself and has been appointed advisory counsel Clive Martin at his request. Currently there is no trial date set. At a pretrial conference on September 19, 1995, the trial court scheduled the next court date for October 3, 1995, for trial setting. The People are ready for trial. Appellee has waived time to at least December 4, 1995, and has stated on the record that he hopes to be ready to proceed to trial sometime around February of 1996.

Dated: 9/21/95

Peggy S. Ruffra
PEGGY S. RUFFRA
Attorney for Appellant/Cross-Appellee

PSR:ma

DECLARATION OF SERVICE BY MAIL

Case Name: ***Charles Edward Moore*** v. ***Arthur Calderon, Warden*** No.: 95-99009
United States Court of Appeals for the Ninth Circuit

I declare that:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **September 21, 1995**, I served the attached

Further response to order re Appellee's trial status

in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Room 300, San Francisco, California 94105, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

MARIANNE D. BACHERS
Attorney at Law
900 North Point St., ste. 220
San Francisco, CA 94109

IRELL & MANELLA
Brian Pass
1800 Avenue of the Stars, Ste. 900
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on **September 21, 1995**.

MABELENE ALHAMBRA
(Typed Name)

S. Alhambra
(Signature)

APPENDIX H

No. A-910

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ARTHUR CALDERON, WARDEN
Applicant,

v.

CHARLES EDWARD MOORE, JR.

Upon Application for a Stay Pending Appeal
from the Ninth Circuit Court of Appeals
(Ninth Circuit Nos. 95-99009, 95-099013;
C.D. Cal. No. CV 91-5976-KN)

REPLY TO MOORE'S OPPOSITION TO
CALDERON'S APPLICATION FOR STAY PENDING
DISPOSITION OF APPEAL IN NINTH CIRCUIT

DANIEL E. LUNGREN,
Attorney General of
the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
GERALD A. ENGLER
Supervising Deputy Attorney General
PEGGY S. RUFFRA
Deputy Attorney General

50 Fremont Street, Room 300
San Francisco, CA 94105
(415) 356-6142

Attorneys for Applicant

To the Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court, and Circuit Justice for the United States Supreme Court of Appeals for the Ninth Circuit:

Arthur Calderon, Warden of the California State Prison at San Quentin, hereby makes this reply to Moore's Opposition to Calderon's Application for Stay Pending Disposition of Appeal in the Ninth Circuit [hereinafter "Opposition"].

Moore argues that the consideration whether he would constitute a danger to public safety if released pursuant to the District Court's order is unfounded. He contends that since he has judgments in Kansas and Colorado, he would simply be transferred from one prison to another in the event no stay was issued. Opposition, pp. 1-2 & fn. 2. In fact, Kansas and Colorado have lodged no detainers or holds on Moore at San Quentin pursuant to those judgments. See Declaration of Peggy S. Ruffra, attached as Exhibit 1. If this Court had not issued a stay on May 30, 1995, the sixtieth day after the District Court's order requiring the state to release Moore or grant him a new trial, and if the state had taken no other steps to comply with the District Court's order, Calderon would have been required to release Moore on May 30, 1995, or else would have been in contempt of the District Court's order.

Moore also argues that Calderon's current Ninth Circuit appeal may be moot, because on May 30, 1995, the Los Angeles District Attorney's Office announced that as a result of the District Court's order it was granting Moore the right to a new trial, calendared the matter for a trial setting conference on June 13, 1995, and obtained a removal order for Moore for that date. Opposition, p. 1, fn. 1. That action was taken subject to the issuance of a stay pending the final disposition of the Ninth Circuit appeal,

in order to comply with the District Court's order and to preserve the right to retry Moore in the event no stay was obtained on May 30, 1995. See Declaration of Peggy S. Ruffra. As of 5 p.m. on Friday, May 26, 1995, the last court day before the sixtieth day after the District Court's order, the Ninth Circuit had refused to grant a stay. As noted above, if the District Attorney had not taken such action and this Court had not issued a temporary stay, Calderon would have been required to release Moore on May 30, 1995, or would have been in contempt of the District Court's order.

Moore also argues that the fact that the Ninth Circuit has ordered the appeal to be expedited minimizes any hardship to the state. Opposition, pp. 2, 13-14. That contention is wrong. If this Court does not grant a stay pending final disposition of the Ninth Circuit appeal, the District Attorney will be compelled to immediately begin retrying Moore's complex and lengthy capital case. The state's resources will be committed to that action, despite the fact that the District Court's order may ultimately be overturned on appeal. The expedited appeal (which has not yet been scheduled) will have no effect on the necessity to proceed to trial forthwith in order to avoid releasing Moore from state custody, whether it be to freedom or to the custody of a sister state in the event a detainer is lodged.

As the foregoing summary demonstrates, the state of California made every effort to timely comply with the District Court's order while still protecting the public's interest in keeping Moore in custody. Calderon clearly was not required to gamble on the issuance of a stay by the sixtieth day of the District Court's order. At the same time, Calderon reiterates his position that the most appropriate action in this case is for this Court to grant a stay pending the final disposition of the Ninth Circuit appeal. Such a

stay will allow the state to obtain full appellate consideration of the important and unresolved issues raised by the District Court's order granting the petition, without the tremendous burden of a premature retrial. Accordingly, we ask this Court to grant a stay pending the final disposition of the Ninth Circuit appeal.

DATED:

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of
the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
GERALD A. ENGLER
Supervising Deputy Attorney General

Peggy S. Ruffra

PEGGY S. RUFFRA
Deputy Attorney General

Attorneys for Applicant

DECLARATION OF PEGGY S. RUFFRA

I, PEGGY S. RUFFRA, declare under penalty of perjury:

1. None of the parties to this action discussed Moore's Kansas or Colorado judgments in relation to the application for a stay in either the District Court or the Ninth Circuit. On Saturday, May 27, 1995, at approximately 5 p.m., I recalled Moore's Kansas judgment and attempted to determine the length of that sentence from the state appellate record, but it did not contain any indication of what the sentence was in the Kansas case. I left a telephone message at San Quentin in which I asked the legal affairs office to see if it could determine the length of the Kansas judgment.

2. On June 1, 1995, Judge Kenyon initiated a telephone conference between Marianne Bachers, one of Moore's habeas attorneys, and myself. He asked about the Kansas judgment, and both Ms. Bachers and I stated that we did not know the length of that sentence or whether Kansas had lodged a detainer at San Quentin pursuant to that judgment.

3. I called San Quentin again on June 1, 1995, after the telephone conference, and spoke with counselor Jean Winnie. She informed me that Moore had judgments in Kansas and Colorado, but that neither state had filed a detainer on Moore with San Quentin.

4. On June 2, 1995, I notified both Marianne Bachers and Brian Pass, Moore's habeas counsel, that there were no detainers on Moore at San Quentin as a result of the Kansas or Colorado judgments. I also told both defense counsel that on May 30, 1995, the Los Angeles District Attorney's Office granted Moore the right to a new trial, subject to the issuance of a stay pending final disposition of the Ninth Circuit appeal,

in order to comply with the District Court's order. I told Mr. Pass, Moore's counsel in Los Angeles, that the case had been scheduled for a trial setting conference on June 13, 1995, in Department J of the Long Beach Superior Court, if he wanted to be present for that court date as habeas counsel. I explained that the court date would be vacated in the event this Court issues a stay pending final disposition of the Ninth Circuit appeal, because the state wishes to pursue its appeal, not a retrial of Moore.

Executed on June 6, 1995, at San Francisco, California.

Peggy S. Ruffra

PEGGY S. RUFFRA

DECLARATION OF SERVICE BY MAIL

Case Name: *Charles Edward Moore* v. *Arthur Calderon* No.: 95-99009
Supreme Court of the United States

I declare that:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **June 6, 1995**, I served the attached

Reply to Moore's Opposition to Calderon's Application for Stay Pending Disposition of Appeal in Ninth Circuit

in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Room 300, San Francisco, California 94105, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

MARIANNE D. BACHERS
Attorney at Law
900 North Point St., ste. 220
San Francisco, CA 94109

IRELL & MANELLA
Brian Pass
1800 Avenue of the Stars, Ste. 900
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on **June 6, 1995**.

MABELENE ALHAMBRA
(Typed Name)

(Signature)

SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, WARDEN *v.* CHARLES EDWARD MOORE, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–1612. Decided June 17, 1996

PER CURIAM.

Respondent Charles Edward Moore, Jr., was convicted of first-degree murder in a California state court, and sentenced to death. The District Court granted habeas relief, concluding that the state court had denied Moore his right to self-representation under *Faretta* v. *California*, 422 U. S. 806 (1975). The District Court thus vacated the judgment of conviction and ordered the warden, petitioner here, to "release Moore from custody after the expiration of 60 days unless, within 60 days hereof, the State of California grants Moore the right to a new trial." App. A to Brief in Opposition A65.

The State filed a notice of appeal and sought a stay of the District Court's order pending appeal, but its various stay applications were respectively denied by the District Court, the Ninth Circuit, 56 F. 3d 39 (1995), and by JUSTICE O'CONNOR, in her capacity as Circuit Justice for the Ninth Circuit. The State accordingly set Moore for retrial, and simultaneously pursued its appeal of the District Court's order on the merits to the Ninth Circuit. The Court of Appeals, observing that the "State of California has granted petitioner Charles Edward Moore, Jr., a new trial," dismissed the State's appeal as moot. App. A. to Pet. for Cert.

It is true, of course, that mootness can arise at any stage of litigation, *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974); that federal courts may not "give

2PP

opinions upon moot questions or abstract propositions," *Mills* v. *Green*, 159 U. S. 651, 653 (1895); and that an appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant "any effectual relief whatever" in favor of the appellant. *Ibid.* The available remedy, however, does not need to be "fully satisfactory" to avoid mootness. *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 13 (1992). To the contrary, even the availability of a "partial remedy," is "sufficient to prevent [a] case from being moot." *Ibid.*

In this case, to say the least, a "partial remedy" necessary to avoid mootness will be available to the State of California (represented here by petitioner). While the administrative machinery necessary for a new trial has been set in motion, that trial has not yet even begun, let alone reached a point where the court could no longer award any relief in the State's favor. Because a decision in the State's favor would release it from the burden of the new trial itself, the Court of Appeals is not prevented from granting "any effectual relief whatever" in the State's favor, *Mills*, *supra*, at 653, and the case is clearly not moot. We therefore grant the respondent's motion to proceed *in forma pauperis*, grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

(4)

CASE NBR: [95101612] CFH STATUS: [DECIDED]
SHORT TITLE: [Calderon, Warden]
VERSUS [Moore, Charles] DATE DOCKETED: [040896]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 25 1996	G	Petition for writ of certiorari filed. (Response due May 8, 1996)
2	May 8 1996		Brief of respondent Charles Moore in opposition filed.
3	May 8 1996	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	May 22 1996		DISTRIBUTED. June 7, 1996 (Page 2)
6	Jun 10 1996		REDISTRIBUTED. June 14, 1996 (Page 15)
7	Jun 17 1996		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jun 17 1996		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

****

Command:[ ]

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